United Nations A/CN.9/614

General Assembly

Distr.: General
5 October 2006

Original: English

United Nations Commission on International Trade Law
Fortieth session
Vienna, 25 June-12 July 2007

Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session (Vienna, 11-15 September 2006)

Contents

		Paragraphs	Page
I.	Introduction	1-6	2
II.	Organization of the session	7-13	3
III.	Deliberations and decisions	14	4
IV.	Revision of the UNCITRAL Arbitration Rules	15-136	5
	General principles	15-21	5
	Section I. Introductory rules	22-58	6
	Section II. Composition of the arbitral tribunal	59-75	13
	Section III. Arbitral proceedings	76-107	17
	Section IV. The award	108-135	23
	Additional provision	136	27

V.06-57526 (E) 121006 131006

I. Introduction

1. At its thirty-first session (New York, 1-12 June 1998), the Commission, with reference to discussions at the special commemorative New York Convention Day held in June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"), considered that it would be useful to engage in a discussion of possible future work in the area of arbitration. It requested the Secretariat to prepare a note that would serve as a basis for the consideration of the Commission at its next session.[1]

2. At its thirty-second session (Vienna, 17 May-4 June 1999), the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), as well as the use of the UNCITRAL Arbitration Rules ("the UNCITRAL Arbitration Rules" or "the Rules") and the UNCITRAL Conciliation Rules, and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[2] When the Commission discussed that topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide).[3]

3. At its thirty-ninth session (New York, 19 June-7 July 2006), the Commission agreed that the topic of revising the UNCITRAL Arbitration Rules should be given priority. The Commission noted that, as one of the early instruments elaborated by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were recognized as a very successful text, adopted by many arbitration centres and used in many different instances, such as, for example, in investor-State disputes. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit, its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to carefully define the list of topics which might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.[4]

4. The topic of arbitrability was said to be an important question, which should also be given priority. It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly with an illustrative list of such matters, or whether the legislative provision to be prepared in respect of arbitrability should identify the topics that were not arbitrable. It was suggested that studying the question of arbitrability in the context of immovable property, unfair competition and insolvency could provide useful guidance for States. It was cautioned however that the topic of arbitrability was a matter raising

questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.[5]

5. Other topics mentioned for possible inclusion in the future work of the Working Group included issues raised by online dispute resolution. It was suggested that the UNCITRAL Arbitration Rules, when read in conjunction with other instruments, such as the UNCITRAL Model Law on Electronic Commerce and the United Nations Convention on the Use of Electronic Communications in International Contracts, already accommodated a number of issues arising in the online context. Another topic was the issue of arbitration in the field of insolvency. Yet another suggestion was made to address the impact of anti-suit injunctions on international arbitration. A further suggestion was made to consider clarifying the notions used in article I, paragraph (1), of the New York Convention of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" or "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought", which were said to have raised uncertainty in some State courts. The Commission also heard with interest a statement made on behalf of the International Cotton Advisory Committee suggesting that work could be undertaken by the Commission to promote contract discipline, effectiveness of arbitration agreements and enforcement of awards in that industry.[6]

6. After discussion, the Commission was generally of the view that several matters could be dealt with by the Working Group in parallel. The Commission agreed that the Working Group should resume its work on the question of a revision of the UNCITRAL Arbitration Rules. It was also agreed that the issue of arbitrability was a topic which the Working Group should also consider. As to the issue of online dispute resolution, it was agreed that the Working Group should place the topic on its agenda but at least in an initial phase, should consider the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.[7]

II. Organization of the session

7. The Working Group, which was composed of all States members of the Commission, held its forty-fifth session in Vienna, from 11 to 15 September 2006. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belarus, Brazil, Cameroon, Canada, China, Croatia, Czech Republic, France, Germany, Guatemala, India, Iran (Islamic Republic of), Italy, Japan, Jordan, Kenya, Mexico, Nigeria, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, and Venezuela (Bolivarian Republic of).

8. The session was attended by observers from the following States: Bahrain, Bulgaria, Democratic Republic of the Congo, Dominican Republic, Finland, Indonesia, Ireland, Kuwait, Latvia, Mauritius, Netherlands, Peru, Philippines, Romania, Slovakia and Ukraine.

9. The session was also attended by observers from the following international intergovernmental organization: Permanent Court of Arbitration.

10. The session was also attended by observers from the following international non-governmental organizations invited by the Working Group: Arab Union for International Arbitration (AUIA), Asia Pacific Regional Arbitration Group (APRAG), *Association Suisse de l'Arbitrage* (ASA), Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Chartered Institute of Arbitrators, the European Law Students Association (ELSA), Forum for International Commercial Arbitration (FICA), International Arbitration Institute (IAI), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), Kuala Lumpur Regional Centre for Arbitration (KLRCA), the London Court of International Arbitration (LCIA), Milan Club of Arbitrators, NAFTA Article 2022 Advisory Committee, School of International Arbitration of the Queen Mary University of London, the Singapore International Arbitration Centre-Construction Industry Arbitration Association (SIAC-CIAA Forum), *Union Internationale des Avocats* (UIA) and the Vienna International Arbitral Centre (VIAC).

11. The Working Group elected the following officers:

Chairman: Mr. Michael Schneider (Switzerland);

Rapporteur: Mr. Trumph Jalichandra (Thailand).

12. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.142); (b) a note by the Secretariat on a revision of the UNCITRAL Arbitration Rules pursuant to the decision made by the Commission at its thirty-ninth session (A/CN.9/WG.II/WP.143 and A/CN.9/WG.II/WP.143/Add.1).

13. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Revision of the UNCITRAL Arbitration Rules and organization of future work.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

14. The Working Group commenced its deliberations on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.143 and A/CN.9/WG.II/WP.143/Add.1). The deliberations of the Working Group with respect to this item are reflected in chapter IV. The Secretariat was requested to prepare a first draft of revised UNCITRAL Arbitration Rules, based on the deliberations of the Working Group.

IV. Revision of the UNCITRAL Arbitration Rules

General principles

15. The Working Group recalled the mandate given by the Commission at its thirty-ninth session (New York, 19 June-7 July 2006) and set out above (see above, paras. 3-6) which provided, inter alia, that any revision of the UNCITRAL Arbitration Rules should not alter the structure of the text, its spirit and drafting style and that it should respect the flexibility of the text rather than make it more complex.[8]

16. The Working Group agreed that the UNCITRAL Arbitration Rules had been one of the most successful instruments of UNCITRAL and therefore cautioned against any unnecessary amendments or statements being included in the *travaux préparatoires* that would call into question the legitimacy of prior applications of the Rules in specific cases. It was considered that the focus of the revision should be on updating the Rules to meet changes that had taken place over the last thirty years in arbitral practice.

17. It was pointed out that the UNCITRAL Arbitration Rules were originally intended to be used in a broad range of circumstances and therefore a generic approach was taken in drafting the Rules. The Working Group recalled that, for that reason, the reference to the word "ad hoc" in the title of the UNCITRAL Arbitration Rules had been deleted at the time the Rules were drafted. It was noted that, in practice, there were at least four types of arbitration where the UNCITRAL Arbitration Rules were used, namely; disputes between private commercial parties where no arbitral institution was involved (a type sometimes referred to as "ad hoc" arbitration), investor-State disputes, State-to-State disputes and commercial disputes administered by arbitral institutions. The question was raised whether in revising the UNCITRAL Arbitration Rules, the Working Group should maintain that generic approach or should include provisions, possibly contained in parallel versions or annexes to the UNCITRAL Arbitration Rules, dealing specifically with the different types of arbitration or disputes to which the Rules applied. It was suggested that inclusion of annexes could provide useful guidance for users, such as States and arbitral institutions when adopting the UNCITRAL Arbitration Rules. In that context, the attention of the Working Group was drawn to the Recommendations adopted by UNCITRAL in 1982 to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules. The Recommendations are designed to provide information and assistance to arbitral institutions and other relevant bodies, such as chambers of commerce, in using the Rules. This may include cases where the Rules are being used as the basis for preparing or revising institutional rules, where arbitral institutions or other bodies are acting as an appointing authority as envisaged under the Rules, or in the provision of administrative services of a secretarial or technical nature for an arbitration conducted pursuant to the Rules.

18. Broad support was expressed for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. The Working Group took note that the Rules had been easily adapted to be used in a wide variety of circumstances covering a broad range of disputes and that this

quality should be retained. The Working Group further noted that the Rules could apply in the future to other situations or types of disputes that had not yet been identified. The view was expressed that, since practice in various areas, including in investor-State dispute settlement, was still developing, it would be undesirable to seek to design specific provisions at this stage. It was also stated that inclusion of specific provisions could undermine the existing flexibility and simplicity of the Rules and therefore make them less attractive. Others were of the view that, either it would be desirable to identify provisions which might need a different set of rules for specific purposes or that, at a minimum, that option should not be disregarded.

19. After discussion, the Working Group agreed that the structure and spirit of the UNCITRAL Arbitration Rules should be maintained. Given that some of the discussion would potentially develop useful conclusions relating to specific situations, such as investor-State disputes or institutional arbitration, it was agreed that any such conclusions should be reflected in the *travaux préparatoires* whether or not those conclusions were ultimately reflected in the Rules or in any material that might accompany the Rules.

20. With respect to the working method to be followed at the current session, it was suggested that the Working Group should identify areas where a revision of the UNCITRAL Arbitration Rules might be useful, possibly giving indications as to the substance or principles to be adopted in relation to the proposed revisions, in order to allow the Secretariat to prepare for subsequent sessions the first tentative draft of the revised UNCITRAL Arbitration Rules. The Working Group agreed, on the basis of documents A/CN.9/WG.II/WP.143 and Add.1, to define the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules and to hear suggestions to the Secretariat for drafting such revisions but not to reach any conclusion at the current session.

Harmonization of the drafting of the UNCITRAL Arbitration Rules with the Model Law

21. The Working Group agreed that harmonizing the provisions of the UNCITRAL Arbitration Rules with the corresponding provisions of the Model Law should not be automatic but rather considered only where appropriate.

Section I. Introductory rules

Scope of application—Article 1

Applicable version of the UNCITRAL Arbitration Rules

22. It was noted that article 1 dealt with the scope of application of the UNCITRAL Arbitration Rules, without determining which version of the Rules would apply in case of revision. In that respect, it was further noted that the model arbitration clause appended to article 1, paragraph (1) referred to the Rules "as at present in force".

23. It was observed that a practice in some arbitral institutions was to include an express interpretative provision to the effect that the rules in force on the date of the commencement of the arbitration proceedings (as opposed to the Rules in force on the date of the contract) should apply unless the parties had agreed to the contrary. It

was observed that, in practice, some parties had a preference to apply the most up-to-date rules to their dispute whereas others preferred the certainty of agreeing on rules in existence at the time the arbitration agreement was made. It was also said that, inclusion of a provision on the applicable rules would have the benefit of avoiding uncertainty as to the applicable version of the Rules in case of future revisions. That proposal received some support.

24. The Working Group further noted that many investment treaties included a provision on settlement of disputes that referred to the "arbitration rules of the United Nations Commission on International Trade Law", without determining which version of those Rules would apply in case of revision.[9] Some treaties expressly stipulated that, in the event of a revision of the UNCITRAL Arbitration Rules, the applicable version would be the one in force at the time that the arbitration commenced.

25. It was observed that given the contractual nature of the Rules, their binding nature was derived from the will of the parties. No version of the Rules could be considered to be "in force" in and of itself outside the context of an agreement between the parties to the dispute (except possibly where a treaty or other instrument mandated dispute resolution by reference to the Rules). It was cautioned that any provision designating a default version of the Rules should be consistent with the principle of party autonomy. If the parties had agreed to apply the former version of the Rules, any transitional provision should not have any retroactive implications for that agreement.

26. The Working Group agreed to revisit the question of the applicable version of the Rules once it had completed its review of the current text of the UNCITRAL Arbitration Rules. It was pointed out that the decision whether or not to include a default provision on the applicable version might depend upon the overall scale of the modifications.

Paragraph (1)

The writing requirement for the agreement to arbitrate and for modification of the Rules

27. It was questioned whether to retain the requirements in article 1, paragraph (1) that both the agreement of the parties to refer disputes to arbitration under the UNCITRAL Arbitration Rules and any modification thereto should be in writing. Diverging views were expressed on that question.

28. It was noted that the purpose of the requirement that the arbitration agreement be in writing was to set out the scope of application of the UNCITRAL Arbitration Rules and, unlike the function of the form requirement under the Model Law, might be separate from the question of the validity of the arbitration agreement (which was left to the applicable law) or from the question of enforcement under the New York Convention.

29. In support of deletion of the writing requirement, it was said that the question of form was a matter that should be left to the applicable law. It was observed that a number of arbitration rules did not require, as a condition for their applicability, an agreement in writing. It was said that the UNCITRAL Arbitration Rules should, in the interests of harmonization of international arbitration, take a consistent approach

with the work of the Working Group in respect of the Model Law, which had reflected a broad and liberal understanding of the form requirement. In addition, it was said that, if such a requirement were to be maintained, it should be defined and that including such a definition would go beyond the usual scope of arbitration rules.

30. However, it was said that preserving a reference to the writing requirement was necessary particularly in light of the fact that there was no uniform approach to that question, some jurisdictions having omitted this requirement and others still requiring writing. In addition, it was noted that the writing requirement could have two functions. First to remind the parties that depending on the applicable law, the agreement to arbitrate might only be valid if made in writing and second, from the point of view of convenience, to provide a basis upon which an appointing authority could appoint arbitrators.

31. The Working Group agreed that that question on whether or not to retain the writing requirement in respect of the arbitration agreement and the modification of the Rules should be further considered.

"*disputes in relation to that contract*"

32. The Working Group noted that article 1, paragraph (1) referred to disputes "in relation to that contract". The Working Group considered whether those words should be omitted so as not to suggest any limitation with respect to the types of disputes that parties could submit to arbitration. The Working Group considered whether article 1, paragraph (1) should be widened to include words consistent with article 7 of the Model Law, which permitted arbitration of disputes "in respect of a defined legal relationship, whether contractual or not" or should contain no restriction at all.

33. Some support was expressed for inclusion of the words "in respect of a defined legal relationship, whether contractual or not" for the reason that it encompassed a broad range of disputes, including those arising in investment treaties that did not relate to a contract at all or that related to a contract involving a person that was not a party to the arbitration. It was also said that inclusion of these words would promote consistency between the Rules and the Model Law, which had been adopted widely. However, it was said that these words simply replaced one restriction with another, which unnecessarily limited the scope of the Rules and could raise interpretative questions that would undermine the certainty of the text. It was stated that a preferable approach would be to include no limitation at all.

34. It was noted that, if the words "in relation to that contract" were deleted then, as a matter of consistency, the words "to a contract" appearing after the words "the parties" should also be deleted. It was noted that such deletion could, in the context of disputes arising under investment treaties, create uncertainty given that the parties to the arbitration agreement might be different to the parties to the dispute. In response, it was said that addressing that specific issue in the UNCITRAL Arbitration Rules would add unnecessary complexity. To avoid this complication, a proposal was made to delete any reference to parties in the opening words of article 1, paragraph (1). That suggestion received some support. As a matter of drafting, it was suggested that wordings along the lines of "Where an agreement to arbitrate refers to the UNCITRAL Arbitration Rules (...)" or "Where it has been

agreed that a dispute shall be settled by arbitration under the UNCITRAL Arbitration Rules (...)" might require further consideration. The Working Group agreed to revisit that question at a future session.

Paragraph (2)

International law

35. The Working Group was generally of the view that it was not necessary to include a reference in article 1, paragraph (2) to "international law" to address cases where a State or an international organization was involved as an arbitrating party. It was said that cases where a source of arbitration law was contained in a treaty or other mandatory international instrument were sufficiently covered by the reference to "the law applicable to the arbitration from which the parties cannot derogate"

Model arbitration clause

36. A question was raised whether the words "arising out of or relating to this contract" should be deleted from the Model Arbitration Clause. It was recalled that the Working Group had envisaged under article 1, paragraph (1) to delete any reference to a contract (see above, paras. 32-34). In response, broad support was expressed for the retention of the reference to the contract in the Model Arbitration Clause, the purpose of which was precisely to provide a recommendation for the parties wishing to include a clause in their contract. In addition, it was said that the deletion of the words ", or the breach, termination or invalidity thereof", which would ensue if the words "arising out of or relating to this contract" were deleted, might lead to unintended or negative consequences, depending upon the extent to which the law governing the arbitration agreement recognized the separability of the arbitration agreement.

37. With respect to the contents of the Model Arbitration Clause, several proposals were made to complement the options offered for consideration by the parties in the note placed at the end of the Model Arbitration Clause. One proposal was to add a paragraph along the following lines "(e) the law governing this arbitration agreement shall be (...)". That concept received broad support, subject to drafting. Another proposal was to add a paragraph referring to the designation of the law governing the contract. That proposal was objected to on the ground that it went beyond the scope of the Arbitration Rules. A further proposal was to amend paragraph (c) to refer to the "[juridical] seat of arbitration" instead of the "place of arbitration" to emphasize that the legal place of the arbitration might differ from the actual place where arbitrators met. Doubts were expressed about that proposal given that it differed from the language used in the Model Law. The Working Group agreed to revisit that proposal in the context of article 16, which dealt with the place of arbitration.

38. A proposal was made to consider whether the arbitration clause should be moved elsewhere given the modifications to article 1, paragraph (1), which no longer contained a reference to a contract. The Working Group agreed to consider that proposal at a future session.

Notice, calculation of periods of time—Article 2

Paragraph (1)

Delivery of the notice

39. The Working Group noted that article 2, paragraph (1) was based on the 1974 UNCITRAL Convention on the Limitation Period in the International Sale of Goods and set forth default provisions, which the parties could vary. It regulated in useful detail when a notice, including a notification, communication or proposal could be deemed to have been received. It was noted that a number of existing arbitration rules referred to delivery by electronic means and it was suggested that article 2 should be amended to reflect contemporary practice. It was noted that such amendments would merely constitute a clarification for the avoidance of doubt, and should not be taken to mean that the current version of article 2, paragraph (1) excluded electronic means of communication.

40. It was also noted that article 2, paragraph (1) referred to a "physical delivery" of notices, thus relying on a concept of effective delivery that did not envisage the possibility of deemed delivery. Some considered that the inclusion of a provision on deemed delivery would be helpful, particularly to deal with the situation where delivery was not possible either because a party had absconded or systematically blocked delivery of notices. The Working Group was referred to article 3.3 of the International Chamber of Commerce Arbitration Rules 1998 ("the ICC Rules") which provided that "A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph", as an example of such a provision.

Paragraph (2)

Modification of periods of time

41. The Working Group proceeded to consider whether article 2, paragraph (2) should be amended to provide that the arbitral tribunal might have an express power to extend or shorten the time periods stipulated under the UNCITRAL Arbitration Rules, as necessary for a fair and efficient process of resolving the parties' dispute.

42. It was observed that article 2, paragraph (2), which dealt with the method of calculation of time limits, might not be the appropriate place to deal with that more general issue. It was suggested that the power of the arbitral tribunal to modify time limits should be considered under article 15, which provided that the arbitral tribunal could conduct the arbitration in such manner as it considered appropriate. It was suggested that language along the following lines could be included: "In discharge of its duties under article 15, paragraph (1), the arbitral tribunal may at any time extend or abridge any period of time prescribed under or pursuant to the Rules".

43. Reservations were expressed as to the need for inclusion of an express provision on the power of the arbitral tribunal to extend or abridge stipulated time limits. The view was expressed that that power could be understood as an inherent power of the arbitral tribunal, particularly in light of article 15.

44. A contrary view was expressed that, given that the power in article 15 was stated to be expressly subject to the UNCITRAL Arbitration Rules and that various time periods were stipulated under different articles of the Rules, the Rules could be interpreted as restricting the power of the arbitrator to amend these time periods.

45. It was suggested that the issue could be assessed once the Working Group had examined all provisions that stipulated a time period, and had determined whether expressly establishing the power of the arbitral tribunal to extend or abridge stipulated time periods was appropriate in each context. That proposal received support.

46. It was noted as well that the granting of such power to the arbitral tribunal would be of practical value when the parties failed to agree on applicable time limits. A question was raised whether the arbitrators should nevertheless be granted the power to modify time limits even where the parties had agreed on these matters. A suggestion was made that time limits agreed upon between the parties before the appointment of the arbitral tribunal might be considered as binding on it whereas any such limitation agreed upon by the parties after the arbitral tribunal had been appointed required the approval of the arbitral tribunal. The Working Group agreed to further consider the issue at a future session.

47. A question was raised whether the UNCITRAL Arbitration Rules should include a time limitation for the rendering of the award. The Working Group agreed that that matter should be considered when reviewing article 32 of the Rules (see below, paras. 118-119).

Notice of arbitration—Article 3

Separation of notice of arbitration from statement of claim

48. The Working Group considered whether the notice of arbitration should be separated from the statement of claim. It was stated that the UNCITRAL Arbitration Rules were carefully drafted so as to constitute a compromise between those who wished the statement of claim to be delivered at the outset and those who preferred a two-tiered approach where the notice of arbitration was followed by the statement of claim.

49. The Working Group agreed that the notice of arbitration and the statement of claim should remain separate documents, which might be submitted at different times, for various reasons. First, it was said that it might be impractical for a party to file a statement of claim together with the notice of arbitration in cases where, for example, there was an urgent need to start the arbitral proceedings either due to a limitation period, to the need to seek interim relief, or to precipitate negotiation of a settlement. Second, it was said that permitting the filing of a statement of claim either together or after the notice of arbitration as set out in the current provisions of the UNCITRAL Arbitration Rules provided for the right level of procedural flexibility.

Contents of notice of arbitration

50. A suggestion was made that article 3, paragraphs (3) and (4), which dealt with the contents of the notice of arbitration should be amended to include more detailed

or additional information in the interests of improving efficiency of the arbitral procedure.

51. In relation to disputes that did not arise out of or in relation to a contract, a proposal was made to consider whether the notice of arbitration should require an indication of the documents or facts out of or in relation to which the dispute arose. It was said that that approach was too broad and there were other methods to address this issue such as, for example, by including language in subparagraph (d), along the following lines: "A reference to the contract, if any, out of or in relation to which the dispute arises" or "A reference to the contract or other legal instrument out of or in relation to which the dispute arises".

52. A proposal was made to require for disputes arising out of a contract that the notice of arbitration should include a copy of that contract (rather than merely a reference to it). It was generally felt that such a requirement would be unnecessarily burdensome and that the existing wording in article 3, paragraph (3)(d) adequately covered all situations, including disputes arising out of a bilateral investment treaty or involving an arrangement, involving some oral part.

53. Another proposal was made to amend article 3, paragraph (3)(c) by replacing the words "general nature" with the words "brief description". Yet, another proposal was made to add under article 3, paragraph (3) the provisions currently contained in paragraph (4) subparagraphs (a) and (b). A proposal was made to include in the notice of arbitration, in addition to those items already listed in paragraph (3), the following elements: proposals by the claimant with respect to the number of arbitrators, the language and the place of the arbitration, if those matters had not already been agreed upon.

54. It was cautioned that imposing the obligation to include too much information in the notice of arbitration might give rise to the question of how to deal with an incomplete notice of arbitration. The Working Group discussed whether that issue should be addressed in the revised Rules or left to the discretion of the arbitral tribunal. To avoid overloading the notice of arbitration, a suggestion was made to determine whether some of the items proposed for inclusion under paragraph (3) should be included as optional items under paragraph (4). Support was expressed for allowing the arbitral tribunal to determine the consequences of an incomplete notice of arbitration. The Working Group agreed to further consider that issue at a future session.

55. It was observed that the notice of arbitration as currently conceived under the UNCITRAL Arbitration Rules constituted a well-recognized feature of the Rules, allowing the parties to start arbitration proceedings in a timely and efficient manner, and it was said that it would be important not to depart from that feature.

Response to the notice of arbitration

56. The Working Group noted that, since the statement of claim was only an optional element in the notice of arbitration, the arbitral tribunal might be constituted without the respondent having an opportunity (or being required) to state its position with respect to matters such as the jurisdiction, the claim, or any counterclaim.

57. The Working Group considered whether the respondent should be given an opportunity to state its position before the constitution of the arbitral tribunal, by responding to the notice of arbitration, and before the submission by the claimant of its statement of claim. It was suggested that providing such an opportunity or, as proposed by some delegations, a procedural obligation, would have the added advantage of clarifying at an early stage of the procedure the main issues raised by the dispute. It was said that inclusion of a right for the respondent to reply to the notice of arbitration would provide an appropriate balance between the applicant and the respondent. Support was expressed for that proposal. The Working Group agreed to discuss at a future session the possible contents of the response to the notice of arbitration.

Commencement date of arbitral proceedings

58. A question was raised whether the date for commencement of the arbitral proceedings should be the date on which the notice of arbitration had been received by the respondent as provided for under article 3, paragraph (2) or whether commencement should be delayed until the date on which response to the notice of arbitration had been received. That matter was considered an important question, particularly in States where the arbitration law defined a time limit for the rendering of an award. The view was expressed that the commencement date of the arbitration should be distinguished from the date as of which the time for rendering the award was counted. The Working Group agreed to further consider that issue.

Section II. Composition of the arbitral tribunal

Number of arbitrators—Article 5

59. The Working Group proceeded to consider whether the default rule on the number of arbitrators of three members should be modified. In support of retaining the default composition for arbitral tribunal of three members, it was said that the default rule of three arbitrators was a well-established feature of the UNCITRAL Arbitration Rules, reproduced in the Model Law, ensured a certain level of security by not relying on a single arbitrator, and should in the interests of familiarity be retained.

60. In favour of inclusion of a default rule of a sole arbitrator, it was said that such a rule would render arbitration less costly and thus make it more accessible, particularly to poorer parties and in less complex cases. However, it was questioned whether such parties might prefer the less costly option of a sole arbitrator and it was suggested that arbitral practice indicated that such parties preferred a three member panel which allowed them to choose at least one arbitrator. The Working Group observed that it was normal practice to have one arbitrator as the default rule in arbitrations administered by some institutions with a discretion to appoint three arbitrators, subject to contrary agreement by the parties. It was noted that in arbitrations conducted outside the framework of an arbitral institution, discretionary selection of three arbitrators by the institution would not be available. It was suggested that discretion to intervene could be granted to the appointing authority in non-institutional arbitrations to appoint three arbitrators in more complex arbitrations. However, concern was expressed that such discretion fell outside the

traditional role for appointing authorities and could introduce a further level of delay in the arbitral proceedings. As well, at the time of appointment of arbitrators, there might not be an appointing authority. It was said that leaving the question of the number of arbitrators to the appointing authority based on the subjective question of whether or not a case was complex introduced a level of uncertainty.

61. A proposal was made that a better way to address the question of accessibility of arbitration and reduction of cost would be to issue guiding recommendations on how to use the UNCITRAL Arbitration Rules in situations involving small claims.

Appointment of arbitrators—Articles 6 to 8

Multiparty arbitration

62. The Working Group took note that articles 6 to 8, which dealt with the appointment of arbitrators, did not include provisions dealing with appointment of arbitrators in multiparty cases. Support was expressed for inclusion of a two-step procedure for the appointment of arbitrators in a multiparty arbitration such that where there were multiple parties, whether as claimant or as respondent, and where the dispute was to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, should nominate an arbitrator. In the absence of such a joint nomination and where all parties were unable to agree on a method for the constitution of the arbitral tribunal, the appointing authority might appoint each member of the arbitral tribunal and designate one of them to act as the presiding arbitrator. Support was expressed for the general principles expressed in that approach.

63. There was general support for the proposal to include a rule which deprived all parties of their right to appoint an arbitrator if the parties on either side were unable to make such an appointment. For example, where the number of either applicants or respondents was very large and did not form a single group with common rights and obligations, involving, for example, a large number of shareholders, the appointing authority should be given authority to make the appointment on their behalf. In the context of that discussion, it was pointed out that the appointing authority should have the discretion to appoint an arbitrator already appointed by a party that was subsequently deprived of its right to appoint. It was suggested that rules relating to multiparty arbitrations should extend beyond appointment of arbitrators and should also deal with the conduct of arbitrations and the method of appointment especially its transparency, where there were multiple parties on both or either side. The Working Group agreed to reconsider these issues at a future session.

Challenge of arbitrators—Articles 9 to 12

Article 9

Ongoing nature of duty to disclose

64. The Working Group proceeded to consider whether article 9, which dealt with the duty of disclosure by an arbitrator, should make it clear that the obligation to disclose matters giving rise to justifiable doubts as to an arbitrator's impartiality and independence was a continuing one, as was provided under article 12, paragraph (1) of the Model Law. It was noted that whilst the Model Law imposed an ongoing

obligation by the words "from the time of his appointment and throughout the arbitral proceedings", the Rules merely referred to the duty "once [the arbitrator was] appointed or chosen". The Working Group agreed that the obligation to disclose under the Rules had in practice been interpreted as an ongoing obligation. Nevertheless, it was agreed that, in order to put that matter beyond doubt and in the interests of achieving consistency with the Model Law, the ongoing nature of the duty to disclose be clarified by using similar language to that used in article 12, paragraph (1) of the Model Law.

65. The Working Group did not support a proposal that disclosure should be in the form of a written declaration.

Article 12

Time limits for challenge

66. The Working Group agreed to consider revising article 12 so as to introduce time limits by which the party making a challenge should seek a decision by the appointing authority. The Working Group agreed that other matters, such as whether or not the arbitral proceedings could continue while a challenge was ongoing, should not be addressed, as such matters were dealt with in applicable laws or left to the arbitral tribunal.

Replacement of an arbitrator—Article 13

Resignation of arbitrators

67. The Working Group considered whether the revised version of the UNCITRAL Arbitration Rules should specify conditions for the resignation of arbitrators in order to avoid spurious resignations, or at least minimize their impact on the overall arbitral process. Article 13 did not contain any provision on that question, and it was noted that, in practice, arbitral proceedings had been adversely affected by *mala fide* or tactical resignations of arbitrators.

68. Various options to define conditions under which the resignation of an arbitrator could be permitted were considered by the Working Group. It was noted that in multi-member arbitral tribunals, a resignation could be approved by the other arbitrators. This would require an arbitrator to provide reasons for resigning and to submit to the other arbitrators' scrutiny and judgement, and could act as an effective deterrent against ill-considered or plainly tactical resignations. This practice would be consistent with the general rule that the arbitral tribunal was responsible for the conduct of the proceedings. Another option was to require the appointing authority to approve the resignation of an arbitrator. However, it was said that the other arbitrators would be in a better position to approve or refuse such resignation as they would be aware of the circumstances and facts of the arbitral proceedings.

69. It was questioned whether the Rules should contain criteria for assessing whether the resignation of an arbitrator was made in good faith or not. In that respect, it was noted that arbitral institutions rarely refused the resignation of arbitrators for the practical reason that obliging participation by a reluctant arbitrator would be detrimental to the arbitral process. It was felt as well that setting criteria for the acceptance or refusal of a resignation by an arbitrator might be too rigid, and a preferable approach was to permit either the remaining members of the

arbitral tribunal or the appointing authority to determine, by reference to the relevant facts and circumstances whether the resignation was acceptable or not. It was said that that approach had the advantage of respecting the contractual foundation of arbitration.

Consequences of a bad faith resignation

70. It was said that there might be two different ways of dealing with an unapproved resignation of an arbitrator. First, the party having initially appointed the arbitrator might be deprived of the right to appoint a replacement arbitrator, which would be vested instead with the appointing authority. The second was to design a provision on truncated tribunal, which would preserve the existence of a three-person arbitral tribunal and thus satisfy the provision found in some national laws that prohibited even-numbered arbitral tribunals (see below, paras. 73-74).

71. The Working Group considered whether the loss of the right to appoint a substitute arbitrator should be automatic or subject to conditions. It was said that the loss of that right should not be connected with the need to prove collusion with the resigning arbitrator. It was also said that the loss of that right was a serious act, which could only be based on the faulty behaviour of a party to the arbitration. It was said that the loss of that right should be based on a fact-specific inquiry, and should not be subject to defined criteria. Rather, the arbitral tribunal or the appointing authority should determine, in its discretion, whether the party had the right to appoint another arbitrator.

72. It was said that the arbitrator who resigned in bad faith might be held liable for such behaviour under the general rules governing the relationship between the parties and the arbitrator.

Truncated tribunals

73. The Working Group proceeded to consider whether the language used in article 13 precluded the possibility of a "truncated tribunal" whereby, after the resignation of an arbitrator, the remaining arbitrators could continue with the proceedings and possibly issue an award, without a substitute arbitrator being appointed. It was observed that some arbitral tribunals had found that the power to act as a truncated tribunal existed under the present Rules without modification. It was pointed out, however, that there was a risk that an award made by a truncated tribunal might not be recognized under some national laws. The view was also expressed that the inclusion of a provision on truncated tribunals was unnecessary in view of the fact that courts could rule on that point either under article 34 of the Model Law or under article V of the New York Convention. However, it was said that relying on differing court interpretations would create a level of uncertainty in respect of truncated tribunals and that it was desirable to provide a solution during the proceedings rather than leave the issue to be dealt with at the enforcement stage. It was suggested that a provision on replacement of an arbitrator should not be limited to resignation by the arbitrator but could extend to other circumstances such as incapacity or death of the arbitrator.

74. It was stated that including a provision on truncated tribunal would be particularly important if it addressed the circumstances in which the truncated tribunal mechanism would apply. It was agreed that the provision should indicate

what kind of conduct would trigger the mechanism, who should be able to decide when the mechanism ought to apply (for example, the appointing authority or the remaining arbitrators), and at what point the mechanism could begin to operate (i.e., only after the conclusion of the hearings or possibly earlier). It was suggested that the mechanism should apply within strict time limits, for example, only once the hearings were closed and should not be available in the case of bona fide resignation but only where there was a *mala fide* resignation or other obstructionist behaviour by an arbitrator.

Repetition of hearings in the event of the replacement of an arbitrator—Article 14

75. The Working Group considered whether article 14 should be revised. Suggestions were made that article 14 be revised to include a provision granting the arbitral tribunal the power to decide whether or not to repeat a hearing when the sole or presiding arbitrator was replaced. Another suggestion was made to revise article 14 along the lines of article 14 of the Swiss Rules of International Arbitration, which provided that, in case of replacement of an arbitrator, the proceedings should resume at the stage where the arbitrator who was replaced had ceased his or her functions, unless the arbitral tribunal decided otherwise. The Working Group requested the Secretariat to provide a revised version of article 14, taking account of the suggested amendments.

Section III. Arbitral proceedings

General provisions—Article 15

76. The Working Group proceeded to consider whether article 15, paragraph (1) should expressly provide that arbitral proceedings should be dealt with by the arbitral tribunal without unnecessary delay. It was said that inclusion of such a principle was otiose but that it might nevertheless be useful to provide leverage for arbitral tribunals to take certain steps both vis-à-vis the other arbitrators and the parties. It was cautioned that inclusion of such a principle could expose the arbitral tribunal to attack for not fulfilling the duty.

77. It was suggested that article 15 of the Rules should not include the words that each party should be given a full opportunity of presenting its case "at any stage of proceedings", which phrase had been omitted from article 18 of the Model Law. It was suggested that, to avoid a situation where a party would insist on submission at an inappropriate stage of the arbitration, the words "at any stage of proceedings" could be replaced by words such as "at the appropriate stage". It was also suggested that the reference to the phrase "a full opportunity" could be contentious and that it might be more appropriate to simply refer to "an opportunity". Caution was expressed as to whether this amendment was really necessary given that the Working Group had no information that the current text had led to problems or created undesirable results.

Preparatory hearings

78. The Working Group agreed that it might not be necessary to include an express provision conferring on the arbitral tribunal the power to hold preliminary consultations or meetings either at the request of the parties or at its own initiative.

Consolidation of cases before arbitral tribunals

79. The Working Group was informed that, in some cases, under the Rules, consolidation of cases was only possible where the parties specifically so agreed and proceeded to consider whether additional provisions on that matter should be added to the Rules. Some support was expressed for inclusion of such provisions based, for example, on the approach taken in article 4 (6) of the ICC Rules, which allowed consolidation when all proceedings related to the same "legal relationship" and subject to the consent of the parties to submit to rules that permitted such consolidation.

80. However, doubts were expressed as to the workability of such a provision given that the Rules often applied in non-administered cases. It was suggested that a number of issues raised by consolidation might be dealt with by other procedures such as set-off or joinder. In that respect, reference was made to article 22.1(h) of the LCIA Arbitration Rules.

Third party intervention in arbitral proceedings

81. The Working Group considered whether an express provision on third party intervention should be included in any revised version of the UNCITRAL Arbitration Rules. It was said that two different situations might be distinguished. One was the situation where a person wished to be heard in the arbitral proceeding, for example, in the form of *amicus curiae* briefs. The second situation was where a party sought to be joined to the proceedings.

82. It was felt that article 15, paragraph (1), of the UNCITRAL Arbitration Rules, which provided that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate", could be interpreted as including a power of the arbitral tribunal to accept interventions by third parties. It was observed that practice showed that third parties were able to join arbitral proceedings under the UNCITRAL Arbitration Rules and the Working Group agreed that there might not be a need to include an express provision on that matter in a revised version of the UNCITRAL Arbitration Rules.

83. The Working Group agreed that third party intervention in arbitral proceedings was a matter closely connected to the confidentiality of proceedings.

Confidentiality of proceedings

84. The Working Group considered whether an express provision on confidentiality should be included in a revised version of the UNCITRAL Arbitration Rules. It was observed that articles 25, paragraph (4), and 32, paragraph (5), of the UNCITRAL Arbitration Rules dealt with the confidentiality of hearings and awards respectively, but did not contain rules regarding the confidentiality of the proceedings as such, or of the materials (including pleadings) before the arbitral tribunal.

85. The Working Group noted that that matter was quite complex, that there were diverse views expressed on the importance of confidentiality, and that the practice and the law were still evolving. It was said that regulating that issue in too much detail would constitute a major departure from the UNCITRAL Arbitration Rules. It was observed that the scope of confidentiality needed could depend on the subject matter of the dispute and the applicable regulatory regimes.

86. The opinion that a general confidentiality provision should not be included was expressed by many delegations. It was also suggested that the matter should be left to be addressed on a case-by-case basis by the arbitrators and the parties. The Working Group agreed to further discuss whether article 32, paragraph (5) would need to be revised.

Place of arbitration—Article 16

87. The Working Group proceeded to consider whether or not to clarify the term "place of arbitration" in article 16. It was observed that the term "place" was used in article 16 under paragraphs (1) and (4) to refer to the seat of arbitration, which determined the law applicable to the arbitral procedure and court jurisdiction, whereas paragraphs (2) and (3) referred to the physical location where meetings might be held. It was suggested that a review be undertaken of the Rules to distinguish provisions where the reference to the term "place" referred to physical locations from those provisions where it referred to the seat of arbitration.

88. A proposal was made to replace the words "place of arbitration" in article 16, paragraphs (1) and (4) with words such as "the seat of arbitration" or "the juridical seat of arbitration". Reservations were expressed as to whether the proposed words would in fact improve the understanding of the provision. It was observed that users were often unaware of the legal consequences attached to the term "place of arbitration". It was suggested that a reference to the "seat of arbitration" could signal the legal implications of that notion and could differ from the physical place where certain elements of the arbitral procedure were carried out or where an arbitrator might sign the award.

89. The Working Group considered but did not reach a conclusion as to whether the Rules should remain consistent with the Model Law (which currently used the expression "place of arbitration") or whether a differentiated terminology should be used.

90. A proposal was made to amend paragraph (4), consistent with article 31, paragraph (3) of the Model Law to provide that an award should be deemed to have been made at the place of arbitration to avoid the risk that an award be declared invalid if it was signed in a place other than the seat of arbitration

Language—Article 17

91. The Working Group heard suggestions that it was unnecessary to revise article 17, paragraph (1) so as to expressly require consultation of the arbitral tribunal with the parties to determine the language or languages to be used in the proceedings. Even though it was noted that as drafted, the requirement that the arbitral tribunal "promptly after its appointment, determine the language or languages" could be interpreted as not requiring consultation, the Working Group

considered that the Rules did not affect the advisability of consulting the parties before the arbitral tribunal took such or any other procedural decision.

Statement of claim—Article 18

92. The Working Group agreed that it was not necessary to include complementary provisions to article 18 on documentary evidence to be provided by the claimant with its statement of claim. It was agreed that that issue could be left to the discretion of the arbitral tribunal or to the parties in organizing the procedure.

Statement of defence—Article 19

Raising claims for the purpose of set-off

93. Article 19, paragraph (3), of the UNCITRAL Arbitration Rules provided that the respondent might make a counter-claim or rely on a claim for the purpose of a set-off if the claim arose "out of the same contract". The Working Group considered whether a revised version of the UNCITRAL Arbitration Rules should contain provisions allowing counter-claims or set-off in a wider range of situations.

94. Views were expressed that the arbitral tribunal's competence to consider counter-claims or set-off should, under certain conditions, extend beyond the contract from which the principal claim arose. To achieve that extension, it was proposed to replace the words "arising out of the same contract" with the words "arising out of the same defined legal relationship". Another proposal was that the restriction be removed altogether although it was noted that such an approach might render the provision unclear as to the legal basis on which the counter-claim or the set-off would be acceptable.

95. A suggestion was made to provide expressly that an arbitral tribunal could only proceed to deal with a counter-claim or a set-off if it had jurisdiction over those matters. It was recognized that determining that issue raised complex questions of consistency of the Rules with laws governing the issues of jurisdiction, counter-claim and set-off. The view was expressed that it was preferable not to include in the Rules a specific provision on jurisdictional issues in the context of counter-claims and set-off and that those issues should be left for the arbitral tribunal to decide. Others expressed the view that some provision should clarify the jurisdictional basis for any counter-claim. The Working Group observed that the function of set-off, which could be understood as a form of payment, differed from that of a counter-claim and different legal principles applied to it.

96. As to the range of situations where issues of counter-claim or set-off could be addressed by the arbitral tribunal, the view was expressed that permitting the arbitral tribunal to deal with any such issue arising out of a legal relationship between the parties might raise important issues, especially in the context of investment disputes, where it might be necessary to adopt a particularly broad understanding of the range of counter-claims and set-off that could be dealt with in the same proceedings.

Pleas as to the jurisdiction of the arbitral tribunal—Article 21

Paragraph (1)

97. The Working Group was generally of the view that article 21, paragraph (1) should be redrafted along the lines of article 16, paragraph (1), of the Arbitration Model Law in order to make it clear that the arbitral tribunal had the power to raise and decide upon issues regarding the existence and scope of its own jurisdiction. It was noted that, in cases where both parties participated in the arbitral process, it would be unusual for the arbitral tribunal to raise such issues in the absence of any objections by the parties. However, it was noted that in some cases, for example, where one party did not participate in the proceedings or where complex issues of arbitrability were at stake such as those relating to competition issues, the parties were not necessarily aware of the arbitrability of the subject-matter of the dispute. The arbitral tribunal should therefore be permitted to decide on its own jurisdiction regardless of the position of the parties.

98. The Working Group was also of the view that article 21 of the Rules should contain an equivalent provision to article 16, paragraph (2), of the Arbitration Model Law, which provided that a party was not precluded from raising a plea as to jurisdiction by the fact that it had appointed, or participated in the appointment of, an arbitrator, and that the arbitral tribunal might, in either case, admit a later plea if it considered the delay justified.

Paragraph (4)

99. The Working Group considered whether article 21 should make it clear that recourse to domestic courts should only be made after the arbitral tribunal had pronounced itself on its own jurisdiction, and that such recourse should not delay the arbitral proceedings or prevent the arbitral tribunal from making a further award, in accordance with article 16, paragraph (3), of the Arbitration Model Law.

100. It was observed that such provision might raise legal and practical difficulties. It was noted that a number of national laws provided parties with an irrevocable right to seek recourse from the courts. Constitutional provisions, article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe, and other examples of mandatory legislation were quoted as particularly authoritative sources of law that would take precedence over arbitration rules. In response, it was said that inclusion of a provision limiting recourse to courts would, pursuant to article 1, paragraph (2) of the Rules, always be subject to mandatory applicable law.

101. It was stated that any proposed provision on recourse should be carefully drafted to take account of the fact that a party should not be prevented from exercising recourse to the courts, particularly before the arbitral tribunal had been constituted and even thereafter if the arbitral tribunal was not functioning properly. For example, where a party sought an application for a stay in a court, that court might need to enquire into the question of jurisdiction.

102. The Working Group agreed to further consider that matter at a future session.

Evidence and hearings—Articles 24 and 25

Article 24

103. The Working Group considered whether a revised version of article 24, paragraph (1) should provide that the power to require a party to produce evidence might be exercised either on the arbitral tribunal's own motion or on the application of any party. The Working Group agreed that that provision did not require modification.

Interim measures of protection—Article 26

104. The Working Group considered whether, and if so, to what extent, article 26 of the UNCITRAL Arbitration Rules should be revised in light of the new Chapter IV A of the Model Law adopted by the Commission at its thirty-ninth session.

105. The Working Group was generally of the view that article 26 should be revised to take account of that new chapter. For instance, the words "in respect of the subject-matter of the dispute", which were deleted from the equivalent provisions in Chapter IV A, could also be deleted from article 26 for being overly restrictive. A suggestion was made that the revised provisions on interim measures might clarify the circumstances, conditions and procedure for the granting of interim measures, consistent with Chapter IV A, or be drafted in such a way that they would give effect to the party autonomy provided by Chapter IV A. However, the Working Group agreed that, given the nature of the Rules, a number of provisions contained in Chapter IV A should not be replicated, such as provisions on the enforcement of interim measures. The view was expressed that the provisions of Chapter IV A that were of a contentious nature and had previously given rise to diverging views in the Working Group should not be included in the UNCITRAL Arbitration Rules, in order not to endanger their wide acceptability.

Experts—Article 27

106. The Working Group considered whether a revised version of the UNCITRAL Arbitration Rules should refer to consultation with the parties before appointing any expert. While the view was expressed that such an obligation was implied, the contrary view was also held that the Rules created no obligation for the arbitral tribunal to consult with the parties in that case. In addition, it was said that the inclusion of such an express statement might lead to unintended results in that it could be misinterpreted as excluding the possibility that the parties be consulted on other matters such as, for example, the content of the report produced by the expert.

107. The Working Group considered whether article 27 should provide that an arbitral tribunal be given the power to direct any expert presented by the parties to meet with the expert appointed by the arbitral tribunal in order to attempt to reach an agreement on contentious issues or, at least, to narrow them down. That proposal was not supported. After discussion, the Working Group was generally of the view that article 27 should remain unaltered.

Section IV. The award

Decisions—Article 31

Paragraph (1)

108. It was noted that article 31, paragraph (1) required that an award be made by a majority of arbitrators in cases where there was a three-member arbitral tribunal. It was proposed to revise that paragraph in order to avoid a deadlock situation where no majority decision could be made. It was said that one solution could be to revise paragraph (1) so as to provide that if an arbitral tribunal composed of three arbitrators could not reach a majority, then the award would be decided by the presiding arbitrator as if he or she were a sole arbitrator.

109. It was said that in the absence of such a provision, the presiding arbitrator could be forced to compromise his or her views to join with the least unreasonable of the co-arbitrators in order to form a majority. However, fears were expressed that such a provision would give too much power to presiding arbitrators. In addition, it was noted that, in cases administered under rules that conferred upon presiding arbitrators the right to make a casting vote, practice had shown that presiding arbitrators rarely exercised that right, as they preferred to seek a unanimous award for the reason that it was felt to have greater persuasion. In response, it was stated that if that right rarely had to be used, it was because it created conditions under which members of arbitral tribunals sought to find common grounds with presiding arbitrators.

110. If such a rule was considered appropriate, it was suggested that consequential amendments relating to the signing of the award and truncated tribunals might also need to be considered.

111. Reservations were expressed as to the need for the proposed rule. It was suggested that the requirement for a majority decision was a well-known feature not only of the UNCITRAL Arbitration Rules but also of other successful sets of rules, such as the arbitration rules of the American Arbitration Association.

112. Given the differing views expressed, the Working Group requested the Secretariat to prepare various options for consideration by the Working Group at a future session, based on information regarding the existing practice of arbitration institutions on that issue.

Form and effect of the award—Article 32

Paragraph (1)

113. It was suggested that the word "partial", which was not used in the Model Law, should be deleted given that a partial award could be considered a final award in respect of the issues on which it ruled.

Paragraph (2)

114. It was proposed that the revised Rules should include a provision inspired from article 28, paragraph (6), of the ICC Rules and article 26.9 of the LCIA Rules, whereby the award should be subject to no appeal or other recourse before any court or other authority. The effect of the new provision would be to make it impossible

for parties to use those types of recourse that could be freely waived by the parties (for example, in some jurisdictions, an appeal on a point of law), but not to exclude challenges to the award (for example, on matters such as lack of jurisdiction, violation of due process or any other ground for setting aside the award as set out under article 34 of the Model Law), inasmuch as the parties could not exclude them by contract.

Paragraph (5)

115. A suggestion was made that the rule contained in paragraph (5) could be reversed requiring an award to be published unless parties agreed otherwise. It was further proposed that any revision of paragraph (5) take account of cases where a party was under a legal duty to disclose an award or its tenor.

116. A question was raised whether paragraph (5) should also encompass draft awards. It was noted that inclusion of draft awards could have implications on confidentiality of deliberations, which the Working Group agreed was a separate issue, yet unsettled in practice, which needed to be further considered.

Paragraph (7)

117. A suggestion was made to revise paragraph (7) so as to avoid an onerous burden being placed on an arbitral tribunal in countries where registration requirements were ambiguous. It was suggested that a revised draft be prepared providing that compliance of the arbitral tribunal with registration requirements be made subject to a timely request of any party. However, reservations were expressed that such a revision might not relieve arbitrators of a registration duty under applicable law and the Secretariat was requested to examine the nature of such duty.

Time limit for rendering the award

118. The Working Group considered whether a time limit should be imposed for rendering of an award. It was noted that the existence of time limits was well known in institutional rules and that, in practice, extensions of such time limits were systematically given. Some support was expressed for inclusion of a time limit with the arbitral tribunal having a one-time option to extend that period.

119. Reservations were expressed on that proposal given that, in non-administered arbitrations, there would be no institution to deal with possible extensions of the time limit. As well, it was indicated that in States having time limits in their arbitration laws, practical problems also existed and therefore strong opposition was expressed to a time limit. It was suggested that rather than imposing an arbitrary time period, flexibility should be retained by inclusion of a general principle that there not be undue delay in rendering an award.

Possible new paragraph (8)

120. The Working Group considered whether a provision imposing a duty on arbitrators and parties to act in the spirit of the UNCITRAL Arbitration Rules, even in circumstances where no specific provision covered the situation in question, should be added. In that respect, it was said that inclusion of principles contained in articles 15 and 35 of the ICC Rules or in article 32 of the LCIA Rules should be considered. The attention of the Working Group was brought to the need of

formulating the new rule in such a way that it would avoid vagueness. After discussion, a provision of the kind suggested was broadly supported, to the extent it would clarify that the Rules constituted a self-contained system of contractual norms and that any lacuna therein was to be filled by interpreting the Rules themselves, without reference to any non-mandatory provision of applicable procedural law.

121. It was also proposed to include a provision on the interpretation of the Rules in accordance with their international origin in line with the new article 2 A of the Model Law.

Applicable law, amiable compositeur—Article 33

Paragraph (1)

Law applicable to the substance of the dispute

122. The Working Group considered whether the words "rules of law" currently used in article 28 of the Model Law should also be used in a revised version of article 33 of the UNCITRAL Arbitration Rules to replace the term "law". Diverging views were expressed on that point and the Secretariat was requested to prepare alternative drafts for consideration by the Working Group at a future session.

123. Another proposal was made to replace the default provision that reference be made to conflict of laws rules failing designation by the parties with a reference to a direct choice of the rules of law most closely connected to the dispute.

Paragraph (2)

Ex aequo et bono—Amiable compositeur

124. The Working Group considered whether article 33, paragraph (2) should be modified to delete the requirement that the law applicable to the arbitral procedure permit an arbitration to be decided *ex aequo et bono*. No support was expressed for that modification.

Interpretation of the award—Article 35

125. A proposal was made that the request to the arbitral tribunal to give an interpretation of the award should be made by both parties. That proposal did not receive support.

126. The Working Group considered whether article 35 should only apply where there was a need to interpret what the award ordered the parties to do. That proposal did not receive support.

Correction of the award—Article 36

127. The Working Group considered whether the scope of article 36 should be broadened to include correction of the award in situations such as arbitrator having omitted to sign the award or to state the date or place of the award. Diverging views were expressed. It was said that the text, which allowed correction in the award of "any errors in computation, any clerical or typographical errors, or any errors of similar nature" was sufficiently broad to encompass such matters. To clarify that omissions were included, a proposal was made to add the words "or omission".

Additional award—Article 37

128. The Working Group considered whether the words "without any further hearings or evidence" should be deleted on the basis that arbitrators should be free to convene hearings or request further evidence or pleadings. Support was expressed for that proposal as it allowed the arbitral tribunal to complete the award in respect of claims that were presented during the arbitral proceedings but had been overlooked in the award. It was suggested that, if further hearings or evidence were necessary, the sixty-day period contained in paragraph (2) might not apply. Reservations were expressed with respect to recognizing the possibility for the arbitral tribunal to hold hearings or receive further evidence, which could be used by the parties as a dilatory tactic to reopen arbitral proceedings.

129. Diverging interpretations were expressed as to whether paragraph (2) could be understood as already allowing the arbitral tribunal to make an additional award after holding further hearings and taking further evidence.

Costs—Articles 38 to 40

Article 38

130. The Working Group considered whether the list of elements included in article 38 was exhaustive. It was stated that the word "only" used in the chapeau resulted in the list being exhaustive.

131. No support was expressed in favour of a proposal to add a reference to the fees and expense of a secretary in paragraph (c). It was said that such fees and expenses were already covered in paragraph (c) through use of the words "other assistance required by the arbitral tribunal".

132. The view was expressed that paragraphs (b)-(d) should be qualified by the word "reasonable".

Article 39

133. The Working Group considered whether it was necessary to provide more guidance on the question of the fees of the arbitrators in any revision of the UNCITRAL Arbitration Rules. It was noted that the absence of any provision on fees could create reluctance to choose the UNCITRAL Arbitration Rules.

134. It was suggested that consideration be given to granting a role to the appointing authority in respect of fees. Some reservations were expressed to granting such a role to appointing authorities for the reason that it might extend beyond their experience. However, it was noted that a number of appointing authorities had experience regarding the functioning of arbitration, including the setting of costs. Another option proposed was to provide a more transparent procedure for agreeing on the method of calculating the arbitral tribunal's fees from the outset.

Article 40

135. A view was expressed that the costs of legal representation and assistance referred to under article 40, paragraph (2) might be already included in the costs of arbitration referred to under article 40, paragraph (1), and that therefore either the

two paragraphs should be merged or the distinction between the two categories of costs should be clarified in any proposed revision of that article.

Additional provision

Liability of arbitrators

136. The Working Group noted that the question of liability had given rise to case law and that a provision on that matter, whether limiting or excluding liability of arbitrators, should be considered for inclusion in the UNCITRAL Arbitration Rules. It was suggested that any provision on liability could require accompanying provisions setting out a code of ethics for arbitrators.

Notes

[1] *Official Records of the General Assembly, Fifty-third Session, Supplement No. 17* (A/53/17), para. 235.

[2] Ibid., *Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

[3] Ibid., para. 338.

[4] Ibid., *Sixty-first Session, Supplement No. 17* (A/61/17), paragraph 184.

[5] Ibid., para. 185.

[6] Ibid., para. 186.

[7] Ibid., para. 187.

[8] Ibid., para. 184.

[9] NAFTA Rules, article 1120 (1)(c); and article 10 (3)(b) of the Greek Model BIT (2001), reprinted in UNCTAD, *International Investment Instruments: A Compendium* vol. VIII (2003) 273; United States of America-Uruguay BIT (2004); article 1(k) of the United States of America Model BIT (1994) reprinted in *UNCTAD, International Investment Instruments: A Compendium* vol. III (1996) 195.

United Nations A/CN.9/615

General Assembly

Distr.: General
6 October 2006

Original: English

United Nations Commission on International Trade Law
Fortieth session
Vienna, 25 June-12 July 2007

Report of Working Group I (Procurement) on the work of its tenth session

(Vienna, 25-29 September 2006)

Contents

		Paragraphs	Page
I.	Introduction	1-3	3
II.	Organization of the session	4-9	4
III.	Deliberations and decisions	10-11	5
IV.	Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services	12-81	5
	A. General comments	12-14	5
	1. Project timetable	12-13	5
	2. Revisions to the Guide to Enactment	14	6
	B. The use of electronic communications in procurement (A/CN.9/WG.I/X/CRP.2 and A/CN.9/WG.I/WP.47)	15-36	6
	1. Communications in procurement: new articles 5 bis and 9/5 ter	15-26	6
	2. Electronic submission of tenders: revision to article 30 (5)	27-30	9
	3. Electronic opening of tenders: revisions to new article 33 (4) (A/CN.9/WG.I/WP.47, paragraph 29)	31-32	10
	4. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.47, paragraphs 30-37)	33-36	10

V.06-57564 (E) 161006 171006

C. Draft provisions to enable the use of electronic reverse auctions in the Model Law (A/CN.9/WG.I/WP.48, A/CN.9/WG.I/WP.43, paragraphs 54-66, A/CN.9/WG.I/WP.43/Add.1, paragraphs 1-6, and A/CN.9/WG.I/WP.40, paragraph 27) 37-71 11

1. Location of the provisions on ERAs 37-39 11

2. Conditions for the use of electronic reverse auctions: new article [36 bis] (A/CN.9/WG.I/WP.48, paragraphs 3-17) 40-47 12

3. Procedures in the pre-auction phase: new article [47 bis] (A/CN.9/WG.I/WP.48, paragraphs 18-27) 48-56 13

4. Procedures in the auction phase: new article [47 ter] (A/CN.9/WG.I/WP.40, paragraph 27, and A/CN.9/WG.I/WP.43, paragraphs 54-58) 57-63 15

5. Other revisions to the text of the Model Law and the Guide to Enactment to enable the use of electronic reverse auctions (A/CN.9/WG.I/WP.43, paragraphs 59-66, and A/CN.9/WG.I/WP.43/Add.1, paragraphs 1-6) 64-71 18

D. Abnormally low tenders (A/CN.9/WG.I/WP.43/Add.1, paragraphs 7 to 13) . 72-78 19

1. Proposed additions to article 34 of the Model Law 72-75 19

2. Proposed additions to the Guide to Enactment text addressing article 34 76-78 20

E. Framework agreements (A/CN.9/WG.I/WP.44 and Add.1) 79-81 20

V. Other Business 82-86 21

I. Introduction

1. At its thirty-seventh session, in 2004, the United Nations Commission on International Trade Law (the "Commission") entrusted the drafting of proposals for the revision of the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "Model Law", A/49/17 and Corr.1, annex I) to its Working Group I (Procurement). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations, including providing for new practices in public procurement, in particular those that resulted from the use of electronic communications (A/59/17, para. 82). The Working Group began its work on the elaboration of proposals for the revision of the Model Law at its sixth session (Vienna, 30 August-3 September 2004) (A/CN.9/568). At that session, it decided to proceed at its future sessions with the in-depth consideration of topics in documents A/CN.9/WG.I/WP.31 and 32 in sequence (A/CN.9/568, para. 10).

2. At its seventh to ninth sessions (New York, 4-8 April 2005, Vienna, 7-11 November 2005, and New York, 24-28 April 2006, respectively) (A/CN.9/575, A/CN.9/590 and A/CN.9/595), the Working Group considered the topics related to: (a) the use of electronic means of communication in the procurement process, including exchange of communications by electronic means, the electronic submission of tenders, opening of tenders, holding meetings and storing information, as well as controls over their use; (b) aspects of the publication of procurement-related information, including possibly expanding the current scope of article 5 of the Model Law and referring to the publication of forthcoming procurement opportunities; and (c) electronic reverse auctions, including whether they should be treated as an optional phase in other procurement methods or a stand-alone method, criteria for their use, types of procurement to be covered, and their procedural aspects. At its seventh and eighth sessions, the Working Group in addition considered the issues of abnormally low tenders, including their early identification in the procurement process and the prevention of negative consequences of such tenders. At its ninth session, the Working Group came to preliminary agreement on the draft revisions to the Model Law and the Guide that would be necessary to accommodate the use of electronic communications and technologies (including electronic reverse auctions) in the Model Law. It decided that at its tenth session it would proceed with further consideration of those draft revisions as well as with the in-depth consideration of the proposed revisions to the Model Law and the Guide addressing the remaining aspects of electronic reverse auctions and the investigation of abnormally low tenders, and, time permitting, would take up the topics of framework agreements and suppliers' lists (A/CN.9/595, para. 9).

3. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, respectively, the Commission commended the Working Group for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law (A/60/17, para. 172, and A/61/17, para. 191). At its thirty-ninth session, the Commission also recommended that the Working Group, in updating the Model Law and the Guide, should take into account issues of conflicts of interest and should consider whether any specific provisions addressing those issues would be warranted in the Model Law (A/61/17, para. 192).

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its tenth session in Vienna from 25 to 29 September 2006. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Belarus, Brazil, Cameroon, Canada, Chile, China, Croatia, Czech Republic, France, Germany, Iran (Islamic Republic of), Italy, Kenya, Lithuania, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Singapore, Spain, Sweden, Thailand, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Bulgaria, Democratic Republic of the Congo, Dominican Republic, Finland, Indonesia, Ireland, Latvia, Malaysia, Philippines, Romania, Slovakia and Timor-Leste.

6. The session was also attended by observers from the following international organizations:

(a) *United Nations system*: United Nations Office of Legal Affairs and the World Bank.

(b) *Intergovernmental organizations*: Asian Clearing Union (ACU), European Commission, European Space Agency (ESA), Inter-American Development Bank (IADB), and Organization for Economic Cooperation and Development (OECD).

(c) *International non-governmental organizations invited by the Working Group*: Centre for International Legal Studies (CILS), European Law Students Association (ELSA), International Bar Association (IBA), and International Chamber of Commerce (ICC).

7. The Working Group elected the following officers:

Chairman: Mr. Stephen R. KARANGIZI (Uganda)

Rapporteur: Sra. Ligia GONZÁLEZ LOZANO (Mexico)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.I/WP.46 and Corr.1);

(b) A note concerning electronic reverse auctions and abnormally low tenders (A/CN.9/WG.I/WP.43 and Add.1);

(c) A comparative study of framework agreements (A/CN.9/WG.I/WP.44 and Add.1);

(d) A note concerning suppliers' lists (A/CN.9/WG.I/WP.45 and Add.1);

(e) A note concerning the use of electronic communications in the procurement process and the electronic publication of procurement-related information, including drafting materials (A/CN.9/WG.I/WP.47);

(f) A further note concerning electronic reverse auctions, including drafting materials (A/CN.9/WG.I/WP.48); and

(g) A note on legislative work of international organizations relating to public procurement (A/CN.9/598/Add.1).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.
5. Other business.
6. Adoption of the report of the Working Group.

III. Deliberations and decisions

10. At its tenth session, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law. The Working Group used the notes by the Secretariat referred to in paragraph 8 above (WP.43 and 44 and their addenda, 47 and 48, and document A/CN.9/598/Add.1) as a basis for its deliberations. The Working Group agreed to defer the consideration of document A/CN.9/WG.I/WP.45 and Add.1 to a future session.

11. The Working Group requested the Secretariat to revise the drafting materials reflecting the deliberations at the tenth session, for its consideration at its next session. It also requested the Secretariat to prepare drafting materials for the Model Law and the Guide on the use of framework agreements. The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide.

IV. Consideration of proposals for the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services

A. General comments

1. Project timetable

12. The Working Group recalled the list of topics for its consideration in revising the Model Law, as follows: (a) electronic publication of procurement-related information; (b) the use of electronic communications in the procurement process; (c) controls over the use of electronic communications in the procurement process; (d) electronic reverse auctions (ERAs) and abnormally low tenders (ALTs); (e) the use of suppliers' lists; (f) framework agreements; (g) procurement of services; (h) evaluation and comparison of tenders, and the use of procurement to promote industrial, social and environmental policies; (i) remedies and enforcement; (j) alternative methods of procurement; (k) community participation in procurement; (l) simplification and standardization of the Model Law; (m) legalization of

documents; and (n) conflicts of interest in the procurement process, a topic that the Commission referred to the Working Group to ensure that the Model Law complied with the requirements of the United Nations Convention against Corruption[1] in this regard (see para. 3 above and para. 85 below).

13. The Working Group expressed its desire to complete its work on those topics in 2008. In seeking to achieve that target, the Working Group noted that its first priority would be the preparation of the revised text of the Model Law itself.

2. Revisions to the Guide to Enactment

14. The Working Group noted that the Guide to Enactment could be addressed not just to legislators, but also to regulators and perhaps operators (procurement officials such as contracting officers and those in charge of designing electronic systems for use in procurement). Therefore, its guidance could contain provisions addressed to each group of users, including guiding principles for legislators, regulatory guidance and practical guidance. However, noting the target date for completion of its work (see para. 13 above), the Working Group noted that it might not be possible to complete all aspects of the guidance by 2008. The Working Group therefore requested the Secretariat to undertake consultations with experts and to draft the Guide to Enactment in the following order of priority: first, following completion of the relevant sections of the Model Law text, guidance for legislators in enacting its text; secondly, guidance for regulators, and, thirdly, perhaps, guidance for other users. At its final session before the revised Model Law text was presented to the Commission, the Working Group would consider the Model Law text and the guidance to legislators and regulators completed to date. The Secretariat would subsequently be entrusted with drafting any remaining aspects of the Guide for consideration by the Working Group.

B. The use of electronic communications in procurement (A/CN.9/WG.I/X/CRP.2 and A/CN.9/WG.I/WP.47)

1. Communications in procurement: new articles 5 bis and 9/5 ter

15. The Working Group considered the wording of the draft articles 5 bis and 9/5 ter as contained in document A/CN.9/WG.I/X/CRP.2, presented to the Working Group for its consideration in addition to the wording of the draft articles proposed in paragraph 3 of A/CN.9/WG.I/WP.47.

16. The general view was that the wording of draft article 5 bis in document A/CN.9/WG.I/X/CRP.2 was an improvement on the previous formulation, as it dealt with the issue of the use of communications in the procurement process in a way that was technologically neutral and addressed functional equivalence among various means of communications. It was suggested that some refinement to make the provisions as precise as possible could be considered, so as to avoid the risk that they could be interpreted differently in different jurisdictions. Furthermore, insufficient precision could inadvertently give rise to the risk of review actions. It was also suggested that the provisions should be drafted in such a way so as to ensure that they addressed all aspects of procurement under the Model Law, and not only communications generated during a particular procurement. An example of an

aspect of procurement that could otherwise be excluded in some jurisdictions would be review procedures.

17. The Working Group considered whether the provisions in draft articles 5 bis and 9/5 ter should be consolidated in one article. The prevailing view was that they should be so consolidated because they both addressed the topic of communications in the procurement process.

18. The consideration of draft articles 5 bis and 9/5 ter then proceeded on the basis of a consolidated article, as follows:

"Article 5 bis. Communications during the procurement process

(1) Subject to the requirements set out in article [cross reference], the procuring entity shall select:

(a) The means by which documents, notifications, decisions and other information in the procurement proceedings are to be communicated by or to the procuring entity or any administrative authority involved in the procurement, or a supplier or contractor or to the public; and

(b) The means by which any requirement under this Law for information to be in writing or for a signature is to be satisfied.

(2) The means of communication of information selected, and of any requirements for writing and signatures being satisfied, must be readily capable of being used with those in common use among suppliers or contractors of the goods, services or construction being the subject matter of the procurement. Such means are to be specified by the procuring entity when first soliciting the participation of suppliers or contractors in the procurement proceedings.

(3) The provisions of paragraph 1 of this article shall apply equally to the creation of the record of the procurement proceedings, and holding meetings of suppliers or contractors.

(4) The procurement regulations shall establish measures to ensure the authenticity, integrity and confidentiality of documents, notifications, decisions and other communications or information.

(5) Subject to other provisions of this Law, documents, notifications, decisions and other information to be communicated by or to the procuring entity or any administrative authority involved in the procurement or a supplier or contractor shall be in a form that provides a record of information contained therein and shall be accessible so as to be usable for subsequent reference.

(6) Communication of information between suppliers or contractors and the procuring entity referred to in articles [7 (4) and (6), 12 (3), 31 (2)(a), 32 (1)(d), 34 (1), 36 (1), 37 (3), 44 (b) to (f) and 47 (1), to update for revisions to Model Law] may be made by means that do not provide a record of the information contained therein provided that, immediately thereafter, confirmation of the communication is given to the recipient of the communication in a form that provides a record of the information contained therein and is accessible so as to be usable for subsequent reference."

19. The following drafting suggestions were made with respect to draft article 5 bis (1): (i) to use the word "specify" instead of "select" in the opening sentence and in subparagraph (2); (ii) to update the cross-references between means and form of communications following the consolidation of the draft article; (iii) as any requirement for information to be in writing or for a signature could be found in other laws, the procuring entity itself might not be in a position to stipulate how the requirements would be satisfied. Accordingly, the text could state either that the procuring entity should set out the requirements in the solicitation documents, referring where necessary to existing laws that governed the questions, or the words "unless regulated by other law" could be inserted in the beginning of subparagraph (b).

20. Regarding draft article 5 bis (2), it was suggested that the word "potential" be added to qualify "suppliers or contractors", so as to make it clear that the provisions addressed suppliers at large. However, it was also recalled that article 2 of the Model Law defined "supplier or contractor" as including potential suppliers and contractors, according to the circumstances. The Working Group requested the Secretariat to consider whether the suggested addition would be necessary in this context, and also to consider whether the drafting of the proviso could be improved.

21. Regarding draft article 5 bis (3), it was agreed that the items referred to should be expanded to include other aspects of the procurement process that would be subject to the same requirements.

22. The Working Group considered the interrelationship between the provisions facilitating the use of electronic commerce already adopted (provisions that may be similar to the UNCITRAL Model Law on Electronic Commerce,[2] for example) and the provisions adopted for the purposes of public procurement. It was noted that other branches of law, such as contract law and the law of electronic commerce, might regulate these issues in some jurisdictions, but that other issues arising in the procurement context might not be covered elsewhere. It was suggested that the paragraph be redrafted in the passive, providing that appropriate measures of authenticity, integrity and confidentiality should be provided for, but should be flexible so that to respect the particular circumstances in each enacting State. The Working Group's attention was drawn to the fact that this paragraph would provide for requirements applicable both to electronic and paper communications, introducing explicit requirements for the former.

23. The point was made that in drafting article 5 bis and any provisions for the Guide to Enactment on confidentiality, trade or other information that should be kept confidential (as required in article 45 of the Model Law, for example) should be distinguished from information that should be made public.

24. It was recalled that the reference to "accessibility" had been deleted from draft article 5 bis (4), as the focus of the paragraph should be on measures needed to ensure security of communication and information in procurement. Accessibility, it was said, aimed at another objective, namely non-discrimination, and should be dealt with elsewhere, or as a separate element of draft article 5 bis (4).

25. The question arose as to whether the Model Law would contain sufficient safeguards against discrimination in communication if article 9 (3) of the Model Law were replaced by the proposed article 5 bis (2). The positive phraseology of draft article 5 bis (2), it was said, was aimed at ensuring competition, rather than

non-discrimination. However, the Working Group noted that the provisions of article 9 (3) could be inconsistent with giving the procuring entity the right to specify the means of communication in the procurement process. The Working Group recalled its consideration of this subject at its ninth session (A/CN.9/595, paras. 23-38), and in particular the reference to the preamble of the Model Law, which provided for the fair and equitable treatment of all suppliers and contractors. Recalling its wish for the Guide to Enactment to elaborate on the notion of non-discrimination, the Working Group decided to continue the approach of addressing the question in the Guide rather than reinserting article 9 (3).

26. It was also agreed that the title of the consolidated draft article, which would address both the means and form of communications in procurement, should be changed to "Communications in procurement" so as to convey the general scope of the article.

2. Electronic submission of tenders: revision to article 30 (5)

27. The Working Group considered the alternative proposals for article 30 (5) contained in paragraph 2 of document A/CN.9/WG.I/X/CRP.2, and in paragraph 21 of document A/CN.9/WG.I/WP.47. The Working Group was of the view that consideration of the revisions to article 30 (5) should proceed on the basis of the text in document A/CN.9/WG.I/X/CRP.2.

28. The following drafting suggestions were made to the proposed text of article 30 (5), which were accepted by the Working Group: (i) to merge the opening sentence in paragraph (a) with subparagraph (i); (ii) to split subparagraph (ii) into two parts, one dealing with submission of tenders in paper and the other with submission of tenders in any other form; (iii) to replace the word "protection" in subparagraph (ii) with the words "integrity and confidentiality", so as to ensure consistency between articles 5 bis (4) and 30 (5)(d); (iv) to delete the word "security" in paragraph (d); and (v) to replace the words "the time of its submission" with either "the time of its receipt", or with "the time as determined by the procuring entity but in no case later than the time of its receipt". The latter formulation was preferred, such that the entire provision would read: "(d) the procuring entity shall preserve the integrity and confidentiality of a tender from the time as determined by the procuring entity, but in no case later than the time of its receipt, and shall ensure that the content of the tender is examined only after its opening in accordance with this Law". The formulation was considered to provide sufficient flexibility in cases where responsibility for protection of tenders was assumed by the procuring entity earlier than the moment of receipt of tenders, so as to allow (for example) for the encryption and decryption of electronic tenders by a procuring entity rather than suppliers.

29. Doubts were expressed as regards the desirability of removing the concept of "security" from the proposed article 30 (5)(d). It was noted that the concept of "security" was different from (though related to) the concepts of integrity and confidentiality. The importance of preserving security in both the paper-based and electronic environments was stressed. The Working Group's understanding was that sufficient safeguards were already provided in draft articles 30 (5) and 5 bis, as amended, to ensure adequate security in the procurement process as a whole and in the submission of tenders in particular.

30. The point was made that the Guide should provide assistance to enacting States as regards these issues. It was noted that separate treatment of submission and receipt of tenders in the paper and electronic environments might be justifiable, so as to avoid imposing more stringent requirements appropriate in the electronic environment on the paper-based environment, where they might not be necessary. It was also noted that imposing excessive requirements might discourage the use of electronic submission of tenders.

3. Electronic opening of tenders: revisions to new article 33 (4) (A/CN.9/WG.I/WP.47, paragraph 29)

31. The Working Group agreed to make the proposed text of new article 33 (4) technologically neutral by deleting references to "electronic", "electronically", and "optical" means of procurement and communication. It was also agreed that the words "capable of following [the opening of the tenders]" would be replaced with the words "fully apprised of" to convey the meaning that suppliers or contractors should be allowed not only to observe the opening process but also make comments instantaneously.

32. The Working Group decided that proposed paragraph 4 as amended would be merged with paragraph 2 of article 33, so that the latter would read as follows:

> "(2) All suppliers or contractors that have submitted tenders, or their representatives, shall be permitted by the procuring entity to be present at the opening of tenders. Suppliers or contractors shall be deemed to have been permitted to be present at the opening of the tenders if they are fully apprised of the opening of the tenders contemporaneously through the means of communication used by the procuring entity."

4. Electronic publication of procurement-related information (A/CN.9/WG.I/WP.47, paragraphs 30-37)

Article 5

33. The Working Group agreed that article 5 would be split into two paragraphs as suggested in paragraph 31 of document A/CN.9/WG.I/WP.47. Significant important judicial decisions and administrative rulings would be required to be published, but with a requirement "to update [the information] on a regular basis if need be", but there would be no requirement to "systematically maintain" that information.

Publication of information on forthcoming procurement opportunities

34. The Working Group noted developments at international and regional levels towards encouraging the publication of information on forthcoming procurement opportunities through regulation, in particular by providing incentives for such publication, such as allowing a shorter time period in the procurement process. Strong support was expressed for the inclusion of provisions on the publication of information on forthcoming procurement opportunities in the Model Law as, it was said, that practice encouraged procurement planning, led to better discipline in procurement (for example, reducing instances of splitting procurements to avoid the application of more stringent rules) and benefited suppliers and contractors (by allowing them to identify needs, plan the allocation of necessary resources and take other preparatory actions for the participation in forthcoming procurements).

35. Caution was expressed, however, as the benefits of such publication were not clearly established, and as the information could change (suppliers or contractors thereby incurring unnecessary costs having relied on it). The Model Law, it was said, should encourage best practice and should recognize that making available abundant irrelevant or misleading information (as opposed to useful and relevant information) might compromise the objectives of the Model Law, including transparency. On the other hand, it was noted that, in some jurisdictions, the publication of such information might already be required or necessary as part of the planning process.

36. The Working Group agreed that enabling provisions on publication of information on forthcoming procurement opportunities should be included in the Model Law, based on the wording in paragraph 33 of document A/CN.9/WG.I/WP.47. The text would be permissive, using the words "procuring entities may publish". The Working Group considered that the word "may" required support to make the provision effective. In this regard, it was agreed that the Guide should refer to incentives that enacting States might provide for procuring entities to publish that type of information, and to any existing regulations and practices. The Working Group noted that the Guide should stress that suppliers or contractors would not be entitled to any remedy if the procurement were cancelled following its pre-advertisement. At the same time, the Guide should draw appropriate balance between the benefits and concerns that publication of that information might raise.

C. Draft provisions to enable the use of electronic reverse auctions in the Model Law (A/CN.9/WG.I/WP.48, A/CN.9/WG.I/WP.43, paragraphs 54-66, A/CN.9/WG.I/WP.43/Add.1, paragraphs 1-6, and A/CN.9/WG.I/WP.40, paragraph 27)

1. Location of the provisions on ERAs

37. The Working Group considered the structure of the Model Law as a whole, noting that the conditions for use and procedures to be applied in particular procurement methods appeared in different chapters of the Model Law. Noting that it might wish to consider altering that structure at a future time, the Working Group agreed on a preliminary basis to include provisions stipulating the conditions for the use of ERAs to chapter II of the Model Law (which listed methods of procurement and their conditions for use). Provisions on procedural matters of ERAs, it was agreed, would be included elsewhere, such as in chapter V of the Model Law (which described procedures for alternative methods of procurement). This location, it was observed, would also allow the use of ERAs in various procurement methods, such as tendering or request for quotations, or as a stand-alone method.

38. However, the Working Group noted that a final decision on the structure of the Model Law would be taken after new procurement techniques, such as ERAs and framework agreements, had been considered. It was also recognized that the current preference for tendering contained in article 18 of the Model Law might be revisited, so as to take account of evolving procurement techniques and tools.

39. The view was expressed that in any event the Model Law would have to impose requirements according to which a procuring entity would choose the procurement method most appropriate for given circumstances. It was also pointed

out that the conditions for use of each procurement method would have to become more precise, especially in the light of the preliminary agreement in the Working Group that the selection of the method of procurement would no longer be exempted from the review under article 52 of the Model Law (A/CN.9/568, para. 112).

2. Conditions for the use of electronic reverse auctions: new article [36 bis] (A/CN.9/WG.I/WP.48, paragraphs 3-17)

Article [36 bis]

40. The Working Group considered the text of draft article 36 bis contained in paragraph 3 of document A/CN.9/WG.I/WP.48. It recalled that all provisions in article 36 bis had to be taken as a package in order to preserve safeguards against improper use of ERAs (A/CN.9/595, para. 96).

41. The following drafting suggestions were made, which were accepted by the Working Group: (i) to put references and provisions related to construction or services in square brackets throughout the text as an indication to enacting States that these types of procurement could be excluded from the scope of the article; and (ii) to delete the reference to "commonly used goods, construction or services" throughout the text and instead use consistently the reference to goods, construction or services that were generally available on the market.

42. The need for subparagraph (a) was questioned in the light of subparagraph (c) since the compliance with the conditions of the latter, it was said, led to the compliance with the requirements of subparagraph (a).

43. As regards subparagraph (d), views varied as to whether both options in the text should be retained, or whether only one should appear in the Model Law (with the Guide to Enactment referring to the other as a possible alternative). It was commented that neither approach would be desirable, if it resulted in conflicting provisions appearing in the Model Law and the Guide.

44. It was noted that the question raised which award criteria should be permitted in procurements through ERAs—price only, or price and other criteria. The view was expressed that to ensure the acceptability of the revised Model Law, its provisions should be drafted in a sufficiently flexible way allowing both price and non-price criteria in determining the successful bid. However, recalling that the primary understanding that ERAs were most suitable for procurements where the price was the only award criterion, it was also commented that the more permissive language of the second option might allow the introduction of non-price criteria in inappropriate circumstances.

45. After discussion, it was decided to retain both options in the Model Law, with the procurement regulations governing which option would be appropriate in the circumstances in any enacting State (to be reflected in the introduction to subparagraph (d)). The second option would be amended to read as follows: "Where the successful tender is to be determined on the basis of the price and other criteria that can be transformed into monetary units and can be evaluated automatically."

46. It was the Working Group's understanding that the Guide would explain in detail the options for enacting States as regards both alternatives under the prevailing circumstances on the ground, including the level of experience with ERAs in any given jurisdiction, whether any services or construction procurement

could be handled through ERAs, and taking into account the sectors of the economy. In addition, the Guide should alert enacting States that ERAs might be prone to elevated risks of corrupt practices through outsourcing decision-making beyond government, such as to third-party software and service providers. The Working Group also noted that provision should be made to ensure that any criteria to be used in determining the successful bid and the evaluation process would be disclosed to suppliers and contractors in the solicitation documents. Further, it was stressed that care would be required to ensure that subjectivity in ERAs was not introduced (such as through a points system), and that simplicity and transparency in the process should be preserved.

Guide to Enactment text

47. The suggestion was made that, in addition to the points listed in paragraph 11 of document A/CN.9/WG.I/WP.48 as requiring a detailed commentary in the Guide, the Guide should stress that procuring entities should be aware of the opportunity costs arising from the use of ERAs (costs such as those flowing should vendors abandon the government market if required to bid through ERAs).

3. Procedures in the pre-auction phase: new article [47 bis] (A/CN.9/WG.I/WP.48, paragraphs 18-27)

48. The Working Group had before it the text of draft article 47 bis, contained in paragraph 18 of document A/CN.9/WG.I/WP.48. The Working Group proceeded with the consideration of the article on the understanding that it would subsequently be merged with article 47 ter (see paras. 57-63 below).

49. The understanding of the Working Group was that provisions on pre-auction procedures had to be revised to ensure consistency with article 36 bis. Some delegates in particular preferred that two different versions of an article dealing with pre-auction procedures be prepared as per the two alternative versions of paragraph (d) of article 36 bis previously agreed (see paras. 40-46 above).

50. The Working Group also agreed that the Model Law should not prevent appropriate use of ERAs as a procurement tool in procurement methods other than tendering, such as request for quotations, as well as in any other procurement techniques that may be envisaged by the revised Model Law, such as framework agreements and dynamic purchasing systems.

51. Independently of the issue of the assessment of the qualification of the suppliers and responsiveness of tenders, the Working Group noted that two types of ERAs should be envisaged: first, a simpler version with price or other modifiable elements that can be transformed to monetary units as the only award criteria; and, secondly, a more complex version, in which non-modifiable elements of the tender would be subject to a prior evaluation. The variable elements that could be expressed as monetary units would subsequently be submitted to the auction.

52. The following drafting suggestions were made, which were referred to the Secretariat for consideration in the preparation of a revised article: (i) with reference to paragraph (1), to set out, for those procurement methods that could appropriately include ERAs, which of the normal requirements for each such procurement method would apply to the ERAs to be conducted (for example, it was noted that article 34 (4) (c), setting out procedures for the evaluation and comparison of

tenders, was not applicable to ERAs); (ii) to permit both the simpler and more complex ERAs set out above; (iii) to redraft the article in a way that would make it clear which pre-auction procedures were involved in the simpler and more complex ERAs; (iv) to reflect that the rules of the conduct of ERAs, the criteria for evaluation of tenders and any formula or other mechanism for automatic re-evaluation of tenders should be disclosed to suppliers or contractors in the beginning of the procurement process; (v) in paragraph (3), to replace the reference to article 34 (3) with a reference to article 34 (2) that dealt with the determination of tenders' responsiveness if references to tendering proceedings were to be retained; (vi) in the context of more complex ERAs, to state that invitations to participate in the auction (following pre-auction assessment(s)) were to be issued to the "bidders that had met mandatory criteria" or to the "bidders that had been chosen" rather than to all those whose tenders had been rejected as a result of those assessments; (vii) to reorder the sequence of the paragraphs to set out procedures common to both ERAs first; and (viii) to make the withdrawal of ERAs mandatory if in the opinion of the procuring entity the number of suppliers or contractors was insufficient to ensure effective competition at any time before the opening (rather than closure) of the auction (although it was noted that that approach was too prescriptive compared with a more flexible approach taken in some jurisdictions).

53. The Working Group considered proposed alternative wording of article 47 bis, which read as follows:

"Article [47 bis]. Conduct of electronic reverse auctions in the pre-auction period

(1) [The provisions of chapter III of this Law shall apply to procurement by means of electronic reverse auctions except to the extent that those provisions are derogated from in this article.]

(2) The procuring entity may require either prequalification or, in addition, submission and assessment of initial tenders.

(3) If the prequalification is required, the procuring entity shall prequalify suppliers or contractors in accordance with article 7 (5) and (6).

(4) If the submission of initial tenders is required, the procuring entity shall carry out an initial assessment of the tenders to determine their responsiveness in accordance with article 34 (2).

(5) The procuring entity shall send an invitation to participate in the auction to all suppliers or contractors except for those who have not been prequalified, or whose tenders have been rejected in accordance with article 34 (3).

(6) The invitation to participate in the auction shall set out the manner and deadline by which suppliers and contractors shall register to participate in the auction. Unless already provided to suppliers or contractors, the invitation to participate in the auction shall include all information necessary to enable the supplier or contractor to participate in the auction.

(7) The procuring entity shall ensure that the number of suppliers or contractors invited to participate in the auction is sufficient to secure effective competition. If the number of suppliers or contractors at any time before the opening of the auction, is in the opinion of the procuring entity insufficient to

ensure effective competition, the procuring entity shall withdraw the electronic reverse auction.

(8) If the successful tender shall be determined on the basis of not only price but price and criteria transformed into monetary units in accordance with article 36 bis [second (d)] [(e)], the procuring entity shall assess those elements of tenders that are not to be presented in the auction in accordance with such criteria and in accordance with the formula specified in the solicitation documents for the transformation of such elements into monetary units."

54. In introducing the draft article, the point was made that the article applied only for the pre-auction phase; in the auction phase, elements other than price and the elements referred to in paragraph (8) of the draft article, if applicable, could be factored in to determine the winning tender. With reference to paragraph (8) of the draft article, it was also pointed out, that its scope had been narrowed in accordance with draft article 36 bis (d), second alternative.

55. The view was expressed that the drafting should allow for the inevitable evolution of ERAs so as to avoid the provisions becoming obsolete. Thus any ERA should be permitted, subject to a number of safeguards, including: (i) transparency through inter alia disclosure early in the procurement process, either in specifications or invitations to pre-qualify or invitation to participate in the auction, all information to suppliers that would allow them to determine how tenders would be evaluated and their ranking in the evaluation process vis-à-vis other participants; and (ii) objectivity through inter alia requiring the finality of the auction stage in determining the successful tender so as to prevent any post-auction evaluation.

56. The Secretariat was requested carefully to consider which of the items listed in paragraph 60 of document A/CN.9/WG.I/WP.43 might need to be retained in the revised provisions. The point was also made that in drafting the provisions either for the Model Law or the Guide no impression should be given that ERAs, even if all criteria for their use under article 36 bis had been met, were necessarily the only or a desirable tool to be used. The Secretariat was requested to consult with experts having practical experience with the ERAs to ascertain that whatever was drafted for the Model Law and the Guide concerning ERAs was workable in practice. Certain parts of the Guide that might require specific review by experts, such as those on ERAs, could be presented separately.

4. Procedures in the auction phase: new article [47 ter] (A/CN.9/WG.I/WP.40, paragraph 27, and A/CN.9/WG.I/WP.43, paragraphs 54-58)

57. The Working Group had before it the text of draft article 47 ter, contained in paragraph 27 of document A/CN.9/WG.I/WP.40 as amended by the text in paragraph 55 of document A/CN.9/WG.I/WP.43. The Working Group proceeded with the consideration of the draft article recalling that it would subsequently be merged with article 47 bis (see para. 48 above).

58. It was noted that the article had been drafted to address ERAs in which the successful supplier would be chosen on the basis of price criteria alone. In the light of its decisions regarding article 36 bis (see paras. 40-46 above), the Working Group considered that the text should be expanded to address both the simple and more complex ERAs, and that other parameters decided during the Working Group's

consideration of articles 36 bis and 47 bis (such as those designed to ensure objectivity and transparency in the use of ERAs) would apply equally, mutatis mutandis, to article 47 ter.

59. It was noted that, further to the Working Group's understanding that ERAs could be used as a procurement tool in different procurement methods and techniques, the provisions in the draft that referred only to procedures conducted in accordance with the provisions of chapter III (tendering proceedings) in paragraphs (3), (6) and (7) would be revised.

60. The question of the anonymity of the bidders during the ERA itself was discussed. The Working Group agreed that the preservation of this anonymity during the auction phase was critical. Views differed, however, as to whether that anonymity should be preserved after closure of the auction. The predominant view was that the identity of the successful supplier and the winning price should be disclosed, as they would be in any other procurement under the Model Law, inter alia so as to permit a review of the procurement if necessary, but that the Working Group would consider at a future session whether to include provisions regarding anonymity after closure of the auction.

61. The following comments were made on the text of the draft article: (i) in paragraph 1 (b), the words "lowest price submitted" should be replaced with the words "result of the auction according to the pre-disclosed formula"; (ii) in paragraph (2), the phrase "dates and times" should be replaced with "date and time"; (iii) in paragraph 3, the phrase "[may also at any time announce the number of participants in the auction but]" and the words "[during the auction]" should be deleted, and the Working Group would revisit at a future session the issue as to whether the references to articles 33 (2) and (3) should be replaced with the language that would reflect more clearly the use of ERAs; (iv) paragraph (3) bis should be placed in square brackets, pending the determination of the Working Group as to whether to retain the provision and, if so, what its contents should be so as to capture only those events that would justify the suspension or termination of an ERA; (v) in paragraph (5), the words "or ranked first according to the pre-disclosed formula" should be inserted after the words "lowest price"; and (vi) in paragraph (6), the provision be revised to provide that if the successful supplier did not enter into a procurement contract, the procuring entity would not be in a position to select another bid and instead might hold another ERA or adopt another procurement method.

62. The Working Group decided to base its future deliberations on the following text:

"Article 47 ter. Conduct of electronic reverse auctions during the auction itself

(1) During an electronic reverse auction:

(a) There shall be automatic evaluation of all bids;

(b) Procuring entities must instantaneously communicate [the result] of the auction according to the pre-disclosed formula to all bidders on a continuous basis during the auction;

(c) All participating suppliers and contractors shall have an equal and continuous opportunity to revise their tenders in respect of those features presented through the auction process.

(2) The auction shall be closed in accordance with the precise method, date and time specified in the solicitation documents or in the invitation to participate in the auction.

(3) The procuring entity shall not disclose the identity of any bidder [until the auction has closed]. [Articles 33 (2) and (3) shall not apply to a procedure involving an electronic reverse auction].

[(3) bis The procuring entity may suspend or terminate the electronic reverse auction in the case of system or communications failures.]

(4) There shall be no communication between the procuring entity and suppliers or contractors during the electronic reverse auction other than as provided for in paragraphs 1 (b) and (c) above.

(5) The successful bid shall be the bid with the lowest price or ranked first according to the pre-disclosed formula at the time the auction closes.

(6) If the supplier or contractor submitting the successful bid in a procedure involving an electronic reverse auction is requested to demonstrate again its qualifications in accordance with [article 34 (6)] but fails to do so, if the supplier or contractor fails to sign a written procurement contract when required to do so, and/or fails to provide any required security for the performance of the contract, the procuring entity may not select another bid but may conduct another electronic reverse auction, which shall then be conducted in accordance with the provisions of this article, or adopt another method of procurement.

(7) Where appropriate, [any reference to a tender in the Model Law] the reference to a tender in articles [list relevant articles] shall be read to include a reference to an initial tender submitted in a procedure involving an electronic reverse auction."

63. In the light of the different conditions for use and procedures that could arise in the use of the simpler and more complex ERAs, and the use of price and non-price criteria, the Working Group requested the Secretariat to consider the preparation of one composite draft for articles 47 bis and ter, to address all ERAs, or to separate the text into two alternatives, to reflect simpler and more complex ERAs. It was noted that if the Secretariat included the text in paragraph 57 of A/CN.9/WG.I/WP.43 addressing non-price criteria in the revisions to be considered at the next session, the word "current" should be deleted, and that the Working Group would consider at its next session whether the reference to "the result" of the ERA in paragraph (1) (b) of the draft article above should be to "the ranking" of the suppliers.

5. Other revisions to the text of the Model Law and the Guide to Enactment to enable the use of electronic reverse auctions (A/CN.9/WG.I/WP.43, paragraphs 59-66, and A/CN.9/WG.I/WP.43/Add.1, paragraphs 1-6)

General comment

64. It was the Working Group's understanding that ERAs could be used in other procurement methods as well as tendering proceedings.

Record of procurement proceedings (article 11) (A/CN.9/WG.I/WP.43, paragraph 59) and modification and withdrawal of tenders (article 31) (A/CN.9/WG.I/WP.43, paragraphs 65-66)

65. The Working Group agreed to revisit the question of how to refer to the use of ERAs in the record, and how and when offers in the context of ERAs could be modified and withdrawn, at a future session.

Contents of solicitation documents (article 27) (A/CN.9/WG.I/WP.43, paragraphs 60-64)

66. The Working Group considered the provisions in paragraph 60 of document A/CN.9/WG.I/WP.43.

67. The following drafting suggestions were made: (i) to start the introduction to paragraph (n) bis with the phrase "in addition to the provisions in article 27"; (ii) in paragraph (n) bis (ii), to replace the reference to the "website address" with "address" or "website or other electronic address"; (iii) to replace the current (n) bis (iii) with "the rules for the conduct of the electronic reverse auction"; (iv) to expand paragraph (n) bis (iv) by referring in addition to the formula that would be used in the evaluation of criteria during the auction (noting that the suggested wording in paragraph 64 of document A/CN.9/WG.I/WP.43 would be amended to comply with articles 36 bis and 47 bis and ter and merged with paragraph (n) bis (iv)); (v) to reinstate, with the opening phrase stating "unless set out in the rules for the conduct of the electronic reverse auction", the provisions of paragraph (n) bis (v), those provisions of paragraph (n) bis (vi) that referred to stages in ERAs and those provisions of paragraph (n) bis (vii) that referred to conditions under which bidders would bid (in particular the reference to increments); and (vi) to amend paragraph (n) bis (ix) to read as follows "all other information concerning the electronic reverse auction necessary to enable the supplier or contractor to participate in the auction". The Working Group confirmed its understanding that the remaining issues of paragraph (n) bis would be addressed in the Guide.

68. The Working Group's understanding was that the Model Law should list only those requirements for the content of the solicitation documents in procurements conducted by way of ERAs that were crucial for the proper handling of ERAs and for the fair and equitable treatment of all suppliers and contractors. The rules of ERAs, which would be included in the solicitation documents, would list any additional requirements, including any technical requirements for a particular ERA. (Recommendations and guidance on those requirements should be discussed in the Guide).

Tender securities (article 32) (A/CN.9/WG.I/WP.43/Add.1, paragraphs 1 to 4)

69. The Working Group noted that tender securities were not often used in ERAs. Views differed as to whether the Guide should discourage requiring tender securities in the context of ERAs, or whether a more flexible approach would be desirable (in that requiring a tender security could serve as a disincentive to withdraw the bid before the opening of the auction).

Examination, evaluation and comparison of tenders (article 34) (A/CN.9/WG.I/WP.43/Add.1, paragraphs 5 to 6)

70. The Working Group considered the provisions in paragraph 5 of document A/CN.9/WG.I/WP.43/Add.1.

71. The Working Group agreed that the following wording would be considered at a future session: "No change in a matter of substance in the initial tender, including changes in price, shall be sought, offered or permitted, except during the auction itself". That wording would make it sure, it was said, that changes to tenders in ERAs were permitted only during the auction phase itself, and would avoid giving the impression that during the auction phase changes could be made to make unresponsive tenders responsive.

D. Abnormally low tenders (A/CN.9/WG.I/WP.43/Add.1, paragraphs 7 to 13)

1. Proposed additions to article 34 of the Model Law

72. The Working Group considered the provisions in paragraph 8 of document A/CN.9/WG.I/WP.43/Add.1.

73. The following drafting suggestions were made: (i) to refer to "concerns as to the capacity of the tenderer(s) to perform the contract" throughout the text; and (ii) to amend paragraph 4 (a) bis (ii) to read as follows: "[t]he procuring entity has taken account of the information supplied, if any, but continues, on a reasonable basis, to hold those concerns".

74. The Working Group's understanding was that the supplier's refusal to provide information requested by the procuring entity should not give an automatic right to the procuring entity to reject the tender on the basis that it was abnormally low. The Working Group deferred its decision on whether any decision regarding abnormally low tenders by the procuring entity should be open to review. The Working Group noted that domestic regulation of that issue might vary significantly. It was suggested that the Working Group might revert to that point when it considered review provisions.

75. The Secretariat was requested to propose the appropriate location for the provisions, taking into account that the issue should not be limited to tendering proceedings, and that risks of ALTs should be examined and addressed by the procuring entity at any stage of the procurement, including through qualification of suppliers.

2. Proposed additions to the Guide to Enactment text addressing article 34

76. It was agreed that the Guide should discuss the issues raised in paragraph 8 of document A/CN.9/WG.I/WP.43/Add.1, other issues considered by the Working Group at its eighth session (A/CN.9/590, paras. 107-109) as well as issues discussed in a note by the Secretariat A/CN.9/WG.I/WP.36 (in particular danger of rejecting tenders applying "arithmetical methods", and the cost-effectiveness and cost implications for SMEs of performance bonds and independent guarantees). The Working Group agreed that the Guide should highlight the importance of adequate examination of tenders for their responsiveness and supplier for their solvency, of precise and detailed specifications and of objective criteria, for identifying and rejecting ALTs.

77. As regards the text for the Guide in paragraph 13 of document A/CN.9/WG.I/WP.43/Add.1, the Secretariat was requested to: (i) consider the order in which the elements of guidance should be presented; (ii) reconsider the reference to "a normal level of profit" in paragraph (1) bis as that criterion might be subjective and possibly irrelevant in defining ALTs; and (iii) provide examples of ALTs rather than defining the concept.

78. With reference to paragraph (1) quater contained in paragraph 13 of document A/CN.9/WG.I/WP.43/Add.1, views varied on whether the Guide should contain more flexible wording regarding information that may be requested by procuring entities about the cost structure of tenders. The prevailing view was that procuring entities should be alerted that it might be inappropriate to request that type of information from suppliers, but that there would be no prohibition on doing so. The Secretariat was requested, in redrafting the provisions for the Guide, to take into account differences in regulation of the subject in various jurisdictions (for example, in some instances, contracting officials were barred from demanding information relating to cost structure, because of risks that such information could be misused).

E. Framework agreements (A/CN.9/WG.I/WP.44 and Add.1)

79. Some delegates and observers updated information in documents A/CN.9/WG.I/WP.44 and Add.1 in the light of the most recent developments in the use and regulation of framework agreement in their respective jurisdictions.

80. The Working Group noted that two major issues would primarily affect the preparation of any drafting materials on the subject: first, whether specifications could be altered within the operation of the framework agreements, and second, whether suppliers not parties to the original framework agreement could join it after the conclusion of the master contract. The view was expressed that the response to these questions would depend on the complexity and subject-matter of framework arrangements. It was suggested that the Model Law provisions should be drafted sufficiently broadly to accommodate any type of framework agreements.

81. The Working Group, recognizing the wide-spread use of framework agreements and noting positive experience with their use in some jurisdictions (and trends towards their express regulation), entrusted the Secretariat with the preparation of drafting materials for the Model Law and the Guide that would set out conditions for the use of framework agreements and provide necessary

safeguards against commonly encountered problems in their use, such as risks of collusion among suppliers, corruption and anti-competitiveness.

V. Other business

82. The Working Group had before it a note by the Secretariat on legislative work of international organizations relating to public procurement (A/CN.9/598/Add.1) (see paras. 8 and 10 above). The Working Group took note of the recommendation by the Commission that the Working Group, in updating the Model Law and the Guide, should take into account the issue of conflicts of interest and should consider whether any specific provisions addressing that issue would be warranted in the Model Law (see para. 3 above).

83. In that context, the Working Group noted the provisions on conflicts of interest contained in the e-tendering and electronic reverse auctions requirements and guidelines of the multilateral development banks (the "MDBs") for MDB financed procurement (A/CN.9/598/Add.1, paras. 15 and 17),[3] and in article 9 of the United Nations Convention against Corruption (A/CN.9/598/Add.1, paras. 43-45). As regards the latter, the Working Group noted that article 9 (1)(e) of the Convention required taking, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements, which had no equivalent in the Model Law.

84. The Working Group also heard a report from the Secretariat on its participation at the coordination meeting of the MDBs (Rome, 19-20 September 2006) that discussed, inter alia a study being undertaken by the MDBs on the issues of corruption and technology in public procurement, in which conflicts of interest in the context of electronic procurement would be specifically addressed.

85. The Working Group agreed to add the issue of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide.

86. The Working Group also heard reports on current legislative and other related activities in the procurement field, from regional and international organizations and authorities and confirmed that its work in revising the Model Law should be undertaken in close cooperation with those organizations and authorities.

Notes

[1] General Assembly resolution 58/4, annex.

[2] For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17* (A/51/17), annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website (http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm).

[3] Section 12 of the E-Tendering Requirements and section 11 of the E-reverse Auction Guidelines, both available at http://www.mdb-egp.org.